

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

**WARDEN, MARYLAND PENITENTIARY,
PETITIONER,**

• vs. •

BENNIE JOE HAYDEN.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

FILED AUGUST 25, 1966

CERTIORARI GRANTED NOVEMBER 7, 1966.

SUPREME COURT OF THE UNITED STATES

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE 2, MARYLAND**

No. 14388

Civil Action

BENNIE JOE HAYDEN, Prison No. 7529, Petitioner,

vs.

VERNON L. PEPERSACK, Warden, Maryland Penitentiary,
Respondent.

The Honorable Thomas B. Finan, Esquire, Respondent's
Counsel, Attorney General of the State of Maryland.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF
HABEAS CORPUS - Filed February 4, 1963

To the Honorable Roszel C. Thomsen, U. S. District
Chief Judge.

Application for leave to file a petition for Writ of Habeas
Corpus In Forma Pauperis, pursuant to title 28 U.S.C.A.
Section 1915 Adkins v. DuPont Co., 335 U.S. 331 in the
Honorable Clerks office.

Petitioner alleges that he is a poor person and is unable
to pay cost of the proceedings or to hire an attorney to
represent him on Habeas Corpus.

Petitioner alleges that the Criminal Court of Baltimore
City, has prohibited him from exhausting his State remedies,
by neglecting, refusing or failing to intertain your
petitioner's application for relief under the uniform post
conviction produce act, which has been in the custody of

Criminal Court of Baltimore City for over 167 days in violation of the due process and equal protection of law clauses to the fourteenth (14) amendment United States Constitution.

[fol. 5] Petitioner advances his allegations in this Honorable Court as presented in Criminal Court of Baltimore City.

The jurisdiction of this Honorable Court is invoked under title 28 U.S.C.A. 2241 and 28 U.S.C.A. section 2254 petitioner Bennie Hayden, prays this Honorable Court to issue a Writ of Habeas Corpus to hold a hearing on his allegations, that his conviction for robbery with a deadly weapon, was obtained in violation of the (fourth (4th) (fifth 5th) (Six 6th) and fourteenth amendments of the United States Constitution and the Supreme Court decision in Mapp v. Ohio 367 US 643 81 Ct 1684 6L. Ed. 2d 1081 (1961).

Introduction Argument

A. That judgment, conviction, and sentence of fourteen years are

1. In violation of the United States Constitution.
2. In violation of the Constitution and laws of the State of Maryland.
3. The Court was without jurisdiction to impose the sentence.
4. The State Court ignored the Supreme Court decision in Mapp v. Ohio.
5. That your petitioner has been denied his rights guaranteed by the United States Constitution.
6. That your petitioner is innocent of false charges of robbery with deadly weapon, as made by the State of Maryland.

[fol. 6] It is respectfully submitted for the above federal and State violations, your petitioner alleges that he should be released from his illegal and unlawful confinement in the Maryland penitentiary at once and petitioner prays as in duty bound Ect. Petitioner alleges that he was arrested without an arrest warrant, nor did the police officers have a search and seizure warrant, nor did the police officers show a search & seizure warrant when your petitioner's wife opened the door of their home and asked police officers what did they want, after they 'the police' inquired is to was there a man in the house, petitioner's wife inquired if they 'the police' had a search and seizure warrant. And these police officers came into your petitioners home and went up to the second floor and searched his home and found two guns, sweater, cap, and a uniform which was used by the state to convict your petitioner on illegally seized evidence in violation of the fourth (4th) amendment United States Constitution.

A. The fourth amendment United States Constitution provides:

The right of the people to be secure in their persons, house's, paper's, and effects agianst unreasonable searche's and seizure's shall not be violated, and no warrants shall be issued but upon probable cause supported by oath or affirmation and particulary describing the place to be searched and the persons and things to be seized.

[fol. 7] The amendment applies to arrest of persons, searche's of persons and their dwellings 1 Mapp v. Ohio 367 US 643 81 Ct 1684 6 L Ed 2d 1081 (1961) held that evidence obtianed in violation of the fourth amendment privileges is not addmissable in a State Court prosecution.

Federal & State Cooperation in the sulation of crime under constitutional standards will be promoted, if only by regulation of their now mutual obligation to respect the same fundamental certeria in their approaches.

Henry vs. US 36, 1 U.S. 98. 100-101, 80 S. Ct 168, 170, 4 L Ed. 2d 134 (1959).

Boyd vs. U.S. 116 U.S. 616, 6 S. Ct 524 (1886) and Mapp v. Ohio, both held that the fourth and fifth amendments to the United States Constitution are intimately related and that a violation of the fourth amendment almost of necessity imperils the citizens rights under the fifth amendment.

The double standard will be prevented only if the federal and state rules of law surrounding the fourth amendment are identical. Applying Mapp v. Ohio, regarding standing to assert the fourth amendment privileges and applied the federal rule of Jones v. U.S. 362 U.S. 257, 80 S Ct 725, 4 L Ed 697 (1960).

[fol. 8] Under the fourth amendment a search cannot be made without a warrant except as an incident to a unlawful arrest, probable cause, absent a warrant dose not justify a search unless exceptional circumstances exist Agnello v. US 20, 46. S. Ct 4, 70 L. Ed 145 (1925) Johnson v. U.S. 333 U.S. 10, 68 S. Ct 367, 92 L. Ed 436 (1948) Chapman v. U.S. 365, U.S. 610, 81 S. Ct, 776, 5 L Ed 2d, 828 (1961) See US v. Block, 202, F Supp. 705, 707, S. D. N. Y. (1962) a recent case which which sums up this line of supreme court cases as follows:

Absent exceptional circumstances, a search not in connection with unlawful arrest may not be made without a warrant. Another exception to the general rule is that a person may waive his rights to the fourth amendment privileges by consententing voluntary (as opposed to submission to lawful authority) to a search or seizure. Johnson v. US Supra. The search in this present case was not an incident to a unlawful arrest. The arrest took place after the unlawful search of your petitioner's home (as officers testified at the trial) without seeing your petitioner comitting a crime, but only on hearsay of another person, who gave false and perjured testimony at the trial with

the knowledge and approval of the states attorney that illegally seized evidence was presented by the States attorney and police officers, mainly in the form of hearsay, which resulted in your petitioner's false indictment of charges of robbery with a deadly weapon.

[fol. 9] Your petitioner alleges that the invasion of his home and the subsequent search without warrant constituted a deprivation of his rights, privileges or immunities guaranteed by the constitution of the United States. Therefore your petitioner alleges that he should be released from his illegal and unlawful confinement in the Maryland penitentiary at once.

Your petitioner's wife testified in the presence of the Honorable Micheal J. Manley that she was threatened when she asked police not to search without a warrant.

That Charles McGuirk, alleged victim failed to identify your petitioner as the person who robbed him, yet the state convicted your petitioner on false and hearsay testimony of John Falls and James O. Waters. Petitioner alleges and adduces that he is innocent of false charges of robbery with deadly weapon are any alleged charges as presented by the State of Maryland.

Respectfully submitted in his proper persons

Bennie Joe Hayden #7529, 954 Forest Street, Baltimore 2, Maryland.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 14388

BENNIE JOE HAYDEN

v.

VERNON L. PEPERSACK, Warden, Maryland Penitentiary.

Thomsen, Chief Judge

MEMORANDUM OPINION AND ORDER—February 4, 1963

Petitioner was convicted in the Criminal Court of Baltimore City of robbery with a deadly weapon (indictment #1259/62) and was sentenced by Judge Manley to fourteen years' in the Maryland Penitentiary from March 17, 1962. No appeal was taken from the conviction.

On August 8, 1962, petitioner filed in the Criminal Court of Baltimore City a motion to strike the conviction and sentence, which was denied by Judge Manley on November 14, 1962. Appeal therefrom was dismissed on January 16, 1963, on motion of the petitioner.

There is now pending in the Criminal Court of Baltimore City an amended petition under the Uniform Post Conviction Procedure Act, which had been originally filed on August 14, 1962.

Since it is apparent that petitioner has not exhausted his state remedies, his petition for habeas corpus filed herein must be and it is hereby denied.

Leave to file in forma pauperis is hereby granted.

The Clerk is instructed to send a copy of this memorandum opinion and order to the petitioner.

Roszel C. Thomsen, Chief Judge, U.S. District Court.

[fol. 42]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Title omitted]

MEMORANDUM AND ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS—September 10, 1963

Petitioner's first petition for a writ of habeas corpus was denied by Judge Thomsen on February 4, 1963, on the ground that petitioner had not exhausted his then available state remedies. At the time of Judge Thomsen's order a petition under the Uniform Post Conviction Procedure Act was pending before the Criminal Court of Baltimore.

Petitioner has now filed a second petition for the issuance of a writ of habeas corpus, substantially in the same form as the one denied by Judge Thomsen. In his second petition, petitioner suggested that he had been denied post conviction relief by the Criminal Court of Baltimore, but that an application for leave to appeal was pending in the Court of Appeals of Maryland. Inquiry of the Clerk of the Court of Appeals of Maryland confirms that an application for leave to appeal has been made and is as yet undetermined.

Under these circumstances, the second petition for a writ of habeas corpus is also premature, and for that reason it will be denied.

[fol. 43] It is, therefore, this tenth day of September, 1963, by the United States District Court for the District of Maryland,

Ordered, that petitioner's petition for a writ of habeas corpus be, and it is hereby, denied; leave to file in forma pauperis is hereby granted; and the Clerk is directed to mail a copy of this Memorandum and Order to petitioner.

Harrison L. Winter, United States District Judge.

[fol. 44]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Persons in State Custody

Case No. 14388—Civil
(To be supplied by the Clerk of the District Court)

BENNIE JOE HAYDEN
Full name and prison number (if any) of Petitioner

VS.

WARDEN, MARYLAND PENITENTIARY.
Name of Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 22, 1964

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be

unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and one copy* shall be mailed to the Clerk of the District Court for the District of Maryland.

[fol. 45] 1. Place of detention Maryland Penitentiary

2. Name and location of court which imposed sentence
Criminal Court of Balt., City Balt., Maryland

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 1259 robbery with deadly weapon

(b) 1260, concealing a deadly weapon

(c)

4. The date upon which sentence was imposed and the terms of the sentence:

(a) June 8, 1962 14 years to the Maryland Penitentiary

(b)

(c)

5. Check whether a finding of guilty was made

(a) after a plea of guilty

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury

(b) a judge without a jury ✓

[fol. 46] 7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

i.

ii.

iii.

(b) the result in each such court to which you appealed:

i.

ii.

iii.

(c) the date of each such result:

i.

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) It was my first time being in the Criminal Court and I didn't know anything to do about being convicted, if I had known anything about an

(b)
appeal I would not have known what to raise, because I was first acquainted with the past conviction by other inmates at the penitentiary, and

(c)
the help of my classification officer.

[fol. 47] 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Arrested without warrant, and the police seized several articles from a search that ranged over my entire home, the articles they took were 2 guns, a sweater, cap, shells, bullets telegrams, and a uniform, all of the evidence was obtained from a search without warrant or consent.
- (b) Prosecuting witness did not identify me as the person that robbed him
- (c) The grand jury of Balt. City issued a indictment against me based on hearsay information

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) The search-arrest, trial conviction, was subsequent to Supreme Courts decision in Mapp v Ohio (evidence obtained in violation of fourth amendment privilege inadmissible in a State Court prosecution. The police acted on hearsay to search and there was no warrant or consent, and the search consisted of exploring my entire home.
- (b) The prosecuting witness did not identify me as the person that robbed him. Neither did anyone testify that I was at the scene of the crime only that I was seen running 70 feet from the scene of the crime according to the State witnesses.
- (c) The indictment is null & void because the charges set forth in it were not supported by the State witnesses.

The indictment charges robbery with deadly weapon and the prosecution did not place me at the scene of the crime, they only produced two witnesses who saw me running and received information

from another person that a robbery had been committed and they testified to what they heard someone say in Court.

[fol. 48] A review of the trial transcript of fact will show that the police did act on hearsay information to arrest me and search my home and if the illegally seized evidence had not been admitted I would not have been convicted, without the evidence all the State could show is that a man was seen running 70 feet from the scene of the alleged crime and this can not be used to convict a person because according to the testimony of state witnesses there were a bunch of men there and anyone of them could have robbed this man and the prosecuting witnesses testified that he is not sure who took the money out of his pocket only that it was gone after the man left. Running only creates suspicion and suspicion is not grounds for an arrest without a warrant, and even if there were probable cause to arrest this still would not create a probable cause for an exploratory search.

[fol. 49] 12. Prior to this petition have you filed with respect to this conviction

- (a) any petition in a State court under the Maryland Post-Conviction Procedure Act, Md. Code of Public General Laws, Art. 27, §§ 645A-645J? ✓
- (b) any petitions in State or Federal courts for habeas corpus? ✓
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other court? ✓

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

- i. Motion to Strike Conviction & sentence
- ii. Past Conviction
- iii. 2 Federal Habeas Corpus's
- iv. 3 State Habeas Corpus's

(b) the name and location of the court in which each was filed:

- i. Criminal Court of Balt. City
- ii. Criminal Court of Balt. City
- iii. U S District Court
- iv. Circuit Court For Prince Georges Co, Circuit Court For Washington Co.

(c) the disposition thereof:

- i. Denied—appeal denied
- ii. Denied—appeal granted—redemption on March 19, 1964
- iii. Denied not-exhausted State remedies
- iv. Denied on March 19's decision

(d) the date of each such disposition:

- i. Nov 14, 1962 appeal denied Jan 13, 1963
- ii. May 16, 1963 appeal granted Dec 12, 1963
redemption March 19, 1964
- iii. Feb 13, 1964 August 1963
- iv. May 13, 1964 June 11, 1964 June 25, 1964

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. Edward v Warden Davis v Warden
Both citations are from the Court of Appeals

ii.

iii.

iv.

[fol. 50] 14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. illegal arrest, illegal search & seizure

ii. No identification by prosecuting witnesses

iii. being indicted on hearsay

(b) the proceedings in which each ground was raised:

i. Past Conviction Proceeding—Motion to Strike

ii. 3 Petitions for State Habeas Corpus

iii. 2 Petitions for Federal Habeas Corpus

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a)

(b)

(c)

[fol. 51] 17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? yes

- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? post conviction

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

- i. Michael Freedman Trial Counsel
1711 Court Square Building Balt. 2
- ii. Samuel M Campanaro post conviction
608 Munsey Building
- iii.

(b) the proceedings at which each such attorney represented you:

- i. Trial
- ii. Post Conviction
- iii.

[fol. 52] 19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1, of this form)?

Bennie Joe Hayden
Signature of Petitioner

Duly sworn to by Bennie Joe Hayden, jurat omitted in printing.

[fol. 56]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Title omitted]

ORDER TO SHOW CAUSE—Filed July 22, 1964

Upon the petition for a writ of habeas corpus filed herein, it is Ordered this 22nd day of July 1964, by the United States District Court for the District of Maryland, that the respondent show cause, if any he (they) may have, on or before the 14th day of August, 1964, why a writ of habeas corpus should not be issued as prayed; it appearing to the Court that more than three days to show cause is required.

Leave to file in forma pauperis is hereby granted.

The Clerk is instructed to mail a copy of the petition and a copy of this Order to the Attorney General of the State of Maryland and to mail a copy of this Order to the petitioner.

Roszel C. Thomsen, Chief Judge, U. S. District Court.

[fol. 57]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER TO ORDER TO SHOW CAUSE—Filed August 14, 1964

Respondent, Franklin K. Brough, Warden, Maryland Penitentiary, by Thomas B. Finan, Attorney General, and Franklin Goldstein, Assistant Attorney General, his attorneys, answering the Petition for Writ of Habeas Corpus filed herein and showing cause why the same should not be granted, respectfully represents unto Your Honor:

1. On May 21, 1962, Petitioner, represented by an experienced criminal attorney, submitted to trial before Judge Michael J. Manley in the Criminal Court of Baltimore City sitting without a jury, under plea of not guilty to a charge of robbery with a deadly weapon.

2. The trial was not concluded on the first day and was resumed on May 22, 1962 and again on May 28, 1962, on which date Petitioner was found guilty by Judge Manley and sentence was deferred pending filing of a Motion for a New Trial.

3. No Motion for a New Trial was filed, and on June 8, 1962 Petitioner was sentenced by Judge Manley to 14 years in the Maryland Penitentiary from March 17, 1962.

4. On June 26, 1962 the Petitioner filed a Petition under the Post Conviction Procedure Act.

5. Subsequent to the filing of the Petition under the Post Conviction Procedure Act, the Petitioner filed a Motion [fol. 58] to Strike the Conviction and Sentence on August 8, 1962 and the said Motion was denied on November 14, 1962. Petitioner took an Appeal to the Court of Appeals of Maryland from the denial of the Motion to Strike Conviction and Sentence, which Appeal was dismissed on January 17, 1963.

6. On April 23, 1963, an experienced attorney was appointed to represent Petitioner in his Petition under the Post Conviction Procedure Act and on May 24, 1963, after a hearing, Judge Anselm Sodaro in the Criminal Court of Baltimore dismissed the Petition. A copy of the Order denying relief and dismissing Petition of Judge Sodaro is attached, made part hereof and marked Exhibit A.

7. On June 5, 1963 Petitioner filed an Application for Leave to Appeal from the Order of Judge Sodaro. On December 12, 1963 the Application for Leave to Appeal was granted and the case was remanded to the Criminal Court of Baltimore for further proceedings to determine

whether "in fact there had been an illegal search and seizure and a consequent arrest without a warrant." *Hayden v. Warden*, 233 Md. 613 (1963), 195 A. 2d 692.

8. As a result of the decision of the Court of Appeals an additional hearing was held before Judge Sodaro in the Criminal Court of Baltimore on March 19, 1964, at which Petitioner was represented by his court-appointed counsel and the Court considered all the facts as to whether or not there had been an illegal arrest and/or an illegal search or seizure. The Petitioner was present at this hearing and testified, and the State introduced testimony with regard to the probable cause of the arresting officer to believe that a felony had been committed^a and that Petitioner had committed the felony. On March 19, 1964 Judge Sodaro filed an Order denying relief and dismissing Petition, in which he set forth the specific findings of fact with regard to the arrest and search and seizure and as a result of his findings of fact, determined that the arrest was legal and that, therefore, the search incident to the arrest was legal. [fol. 59] A copy of the March 19, 1964 Order of Judge Sodaro is attached hereto, made part hereof and marked Exhibit B. On March 24, 1964 Petitioner filed an Application for Leave to Appeal from the March 19, 1964 Order of Judge Sodaro.

9. On April 25, 1964 Petitioner sent a letter to the Clerk of the Court of Appeals of Maryland requesting the withdrawal of the Application for Leave to Appeal. A copy of said letter is attached hereto, made part hereof and marked Exhibit C. On April 29, 1964 the Chief Deputy Clerk of the Court of Appeals of Maryland wrote to the Petitioner and informed him that in accordance with his instructions, the Application for Leave to Appeal had been withdrawn. A copy of said letter is attached hereto, made part hereof and marked Exhibit D.

10. Subsequent to the withdrawal of the Application for Leave to Appeal from the March 19, 1964 Order of Judge

Sodaro, the Petitioner filed with the Circuit Court for Washington County an Application for Issuance of a Writ of Habeas Corpus which was denied on May 13, 1964 in a Memorandum Opinion of Judge D. K. McLaughlin, which is attached hereto, made part hereof and marked Exhibit E. He then filed an additional Application for the Issuance of a Writ of Habeas Corpus with the Circuit Court for Prince George's County which was denied on June 11, 1964 in an Opinion and Order of Court of Judge William P. Bowie, a copy of which is attached hereto, made part hereof and marked Exhibit F. Finally he filed a second Application for Issuance of a Writ of Habeas Corpus in the Circuit Court for Prince George's County which was denied in an Opinion and Order of Court of Judge William P. Bowie on June 29, 1964, a copy of which is attached hereto, made part hereof and marked Exhibit G.

11. While Petitioner was seeking State remedies in the above described manner, he also filed two Petitions for a Writ of Habeas Corpus in the United States District Court for the District of Maryland. One Petition was denied by Judge Roszel C. Thomsen on February 4, 1963 for failure to exhaust then available State remedies and the second Petition was denied by Judge Harrison L. Winter on September 10, 1963, also for failure to exhaust then available State remedies.

12. Petitioner's basic contentions are the following:

(a) That the arrest was illegal and that, therefore, the search and seizure incident to the arrest were also illegal. (As part of this contention Petitioner appears to argue that since the arresting officer acted on information received over his police radio and from a cab driver who had seen Petitioner leave the premises where the hold-up had taken place and run into a dwelling, the arrest was based on "hearsay.")

(b) That the prosecuting witness did not identify him and that no one places him at the scene of the crime.

(c) That the Grand Jury of Baltimore had issued an indictment based on "hearsay information." (Here again the Petitioner seems to argue that the fact that certain witnesses did not see him commit the crime but saw him running from the scene of the crime in some way makes their testimony hearsay.)

13. Petitioner alleges that he did not take a direct appeal because he was unacquainted with criminal procedures. This statement by Petitioner would appear to prevent a contention that Petitioner knowingly and intentionally waived his right to appeal. However, after once utilizing the Post Conviction Procedure Act and obtaining a result whereby his case was remanded for a further hearing under the Post Conviction Procedure Act, Petitioner again applied for leave to appeal and then by his own letter, which is Exhibit C, requested withdrawal of the Application for Leave to Appeal. Exhibit C speaks for itself and the Respondent contends that this was a knowing and intentional waiver of a State remedy which was available to him and that, therefore, Petitioner is precluded from making these contentions in this proceeding.

14. Even if this Court does not find Petitioner knowingly and intentionally failed to exhaust all State remedies available to him, it appears that there is no factual basis for the Petitioner to claim that any of his constitutional rights were violated. Petitioner's second and third contentions were disposed of by the first opinion of Judge Sodaro and by the decision of the Court of Appeals on the Application for Leave to Appeal. It is readily apparent that both of these contentions go only to the weight of the evidence and, therefore, are not available in a Petition for Writ of Habeas Corpus in the Federal Court.

15. Petitioner's first contention was the basis for the remand by the Court of Appeals of Maryland for a factual determination as to whether or not there had been any illegal arrest which would make the search and seizure

incident to the arrest also illegal. Judge Sodaro clearly set forth the testimony presented in the hearing before him at which Petitioner was represented by counsel and testified himself. Judge Sodaro found that the arrest was legal and that, therefore, the search and seizure incident to the arrest were also legal. Judge Sodaro's conclusions of law from his findings of fact are completely justified under present Maryland law. There can be no doubt that Officer Parrish had reasonable cause to believe that a felony had been committed and that Petitioner had committed it and that the Petitioner was present in the dwelling, 2111 Koko Lane. This gave the officer the right while in the course of "hot pursuit", to go to the door of the residence as he did, request admittance and arrest Petitioner without a warrant. See *Brinegar v. United States*, 338 U.S. 160, 179, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *Reeves v. Warden*, 226 F. Supp. 953, 957 (D. Md. 1964); *Mulcahy v. State*, 221 Md. 413, 421, 158 A. 2d 80 (1960). After the arrest of the Petitioner the officer had the right as an incident of the arrest, to search the Petitioner and his surroundings. See *Hitt v. State*, Court of Appeals of Maryland, No. 420, September Term 1963 (July 8, 1964); *Farrow v. State*, 233 Md. 526, 197 A. 2d 434 (1964). See also *Ralph [fol. 62] v. Pepersack*, United States Court of Appeals for the Fourth Circuit, No. 9176 (July 16, 1964). In the case of *Ker v. California*, 374 U. S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963), it is stated at 10 L. Ed. 2d at 738 that:

"The States are not to be precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . ."

The well established doctrine of the Maryland Courts (and, indeed, the Federal Courts) that arrest may be made

without a warrant where the arresting officer has reasonable cause to believe that a felony has been committed and that the defendant is the one who has committed the felony, was properly applied by Judge Sodaro in this case and, therefore, this Honorable Court should dismiss the within Petition.

Petitioner has filed with this Honorable Court a copy of the trial transcript which Petitioner apparently procured from the Court Reporter himself. The Respondent does not have, nor did Respondent ever have a copy of the trial transcript. The Respondent has examined the file of the Criminal Court of Baltimore in connection with the Application for Relief under the Post Conviction Procedure Act and has determined that Petitioner's transcript of the trial was submitted to Judge Sodaro, and was available to Judge Sodaro at the time of the post conviction hearing. The Respondent contends that the transcript of the trial supports the findings of fact made by Judge Sodaro in his Order of March 19, 1964.

16. Respondent specifically denies and traverses each and every one of the allegations contained in the Petition.

Wherefore, the Petitioner is not illegally imprisoned, detained or restrained of his liberty by Respondent and Respondent, having fully answered the Petition for Writ [fol. 63] of Habeas Corpus filed herein, and having shown cause why the same should not be granted, requests that the Petition be dismissed.

Thomas B. Finan, Attorney General, Franklin Goldstein, Assistant Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201, 539-5413, Attorneys for Respondent.

Certificate of Service (omitted in printing).

[fol. 64]

EXHIBIT A TO ANSWER
IN THE CRIMINAL COURT
OF
BALTIMORE

Indictment #1259/1962
Post Conviction #452

IN THE MATTER OF
BENNIE JOE HAYDEN

VS.

WARDEN, MARYLAND PENITENTIARY.

Hearing under the Uniform Post
Conviction Procedure Act.

ORDER DENYING RELIEF AND DISMISSING PETITION—
May 24, 1963

The Petitioner has filed a petition under the Uniform Post Conviction Procedure Act, was represented by an attorney appointed by the Court and was present at a hearing before me on May 16, 1963.

On May 28, 1962, the Petitioner was found Guilty generally on an Indictment charging Robbery with Deadly Weapon, (nolle Prosequi being entered by the State as to the Seventh Count of said indictment) by Judge Michael J. Manley, sitting without a jury, after first having entered a plea of Not Guilty. He was sentenced to the Maryland Penitentiary for a term of fourteen years, dating from March 17, 1962.

In his amended Petition the Petitioner contends:

1. Illegal search and seizure.
2. No positive identification.
3. Nolle Prosequi of one count by the State is proof of innocence.
4. Denial of speedy trial.

All of these contentions are without merit.

As to the first contention, illegal search and seizure—questions of the legality of search and seizure relating to the admissibility of evidence obtained by an allegedly illegal search and seizure should have been raised at the trial, and are not grounds for relief under the Act. (*Ward v. Warden*, 222 Md. 595, certiorari denied 80 S.Ct. 1254; *Rice v. Warden*, 221 Md. 145; *Nears v. Warden*, 220 Md. 682; *Banks v. Warden*, 220 Md. 652.

[fol. 65] 2. No positive identification—this question could have been reviewed on a Motion for a New Trial or an Appeal to the Court of Appeals of Maryland, neither of which was taken, and the Act is not a substitute for a Motion for a New Trial or for an Appeal. (*Turner v. Warden*, 220 Md. 683; *McClain v. Warden*, 220 Md. 666.) This question relates to weight and sufficiency of evidence and is not a matter to be raised under the Act. (*Scott v. Warden*, 222 Md. 596; *Galloway v. Warden*, 221 Md. 611).

3. Nolle Prosequi of one-count in an indictment reflects the Petitioner's innocence of other counts—This deals with the weight and sufficiency of the evidence as to one of the counts charged and is again a question that could have and should have been properly raised on a Motion for a New Trial, or an Appeal, and neither remedy was sought by the Petitioner, therefore he is not entitled to have this question reviewed under the Act. (*Scott v. Warden*, 222 Md. 596; *Doris v. Warden*, 222 Md. 586; *Galloway v. Warden*, 221 Md. 611; *Wilson v. Warden*, 222 Md. 580.)

The State has the right to nol pros one or more counts in an indictment if it appears that the Defendant was improperly charged in that count or if the evidence available to the State did not sustain the charge set forth in that count.

4. Denial of speedy trial, or denial of due process—in the absence of facts constitutes no ground for relief. Here the Petitioner was arrested on March 17, 1962, and his trial began on May 21, 1962, and concluded on May 28, 1962. (Spencer v. Warden, 222 Md. 582; Daniels v. Warden, 222 Md. 606; Farley v. Warden, 223 Md. 647; Fisher v. Warden, 224 Md. 669).

At the hearing on May 16, 1963, the Petitioner advances an additional contention—that the Grand Jury of Baltimore City returned the indictment in question against him based on hearsay evidence. This contention is also without [fol. 66] merit for this is a matter that cannot be reached under the Act.

He further testified that he was not satisfied with the services of his attorney, Mr. Michael F. Freedman, because he failed to object to hearsay evidence at the trial. This is a bald assertion unsupported by any specifics, and is also without merit. He does not claim that his attorney for any other reason was incompetent or failed to properly represent him.

For the above reasons it is ORDERED this 24th day of May, 1963, that the Petition be and it is hereby dismissed.

/s/ ANSELM SODARO
Judge

[fol. 67]

EXHIBIT B TO ANSWER

IN THE CRIMINAL COURT
OF
BALTIMORE

Indictment #1259/1962

Post Conviction #452

IN THE MATTER OF
BENNIE JOE HAYDEN
VS.

WARDEN, MARYLAND PENITENTIARY.

Hearing under the Uniform Post
Conviction Procedure Act

ORDER DENYING RELIEF AND DISMISSING PETITION—
March 19, 1964

Pursuant to the Mandate of the Court of Appeals of Maryland in the case of Bennie Joe Hayden v. Warden, Maryland Penitentiary, Appeal No. 40 September Term 1963, filed December 12, 1963, Md. , 195 Atl. 2d 692, a hearing was held on March 19, 1964, to determine whether in fact the Petitioner had been illegally arrested, searched and seized. The Petitioner was present at this hearing and represented by court appointed counsel.

The Petitioner testified that on March 17, 1962, he was arrested in his home after being awakened from sleep; that his home was searched, certain articles were seized and he was subsequently taken to the police station; that there was no warrant of arrest. He testified further that his wife opened the door of his home; that he placed the

5

gun (which had apparently been used in the holdup) in the toilet bowl; that he was therefore illegally arrested and illegally searched.

The State produced Officer Parrish, one of the arresting officers, who testified that while riding in a cruising patrol he received a call that a holdup had been perpetrated at the lunchroom in the Diamond Cab Company; that after receiving the call he was directed by a cab driver, who had apparently seen the defendant leave the premises where the holdup had taken place and run from the lunchroom into a dwelling at 2111 Koko Lane. Acting on the information received over the air and upon the direction of the cab driver who followed the defendant to the Koko Lane address, the policeman rapped on the door of 2111 Koko Lane; he was admitted by the defendant's wife. The [fol. 68] defendant's wife gave the policeman permission to enter the home; he then went upstairs to the bedroom where he found the defendant in bed; the bullets and the gun clip, and a hat and shirt of the defendant, were found under the pillow. The defendant was subsequently taken to the police station and charged with the offense. The defendant was identified in court by two cab drivers who observed him running from the lunchroom to his home.

From the testimony before me I have concluded that the Petitioner's contention is without merit, and that his arrest was legal and that the search of his home and the seizure of the articles in question were proper.

For the above reasons it is ORDERED this 19th day of March, 1964, that the Petition be and it is hereby dismissed.

ANSELM SODAKO
Judge

3/19/64

[fol. 73]

EXHIBIT C TO ANSWER

PETITIONER'S EXHIBIT No. 1 (ID)

Civil

NAME Bennie Hayden No 7529

ADDRESS 954 Forrest Street
Baltimore, Maryland

M The Hon. J. Floyd Young Esquire,
STREET Clerk, Court of Appeals of Maryland
CITY Annapolis STATE Maryland

DATE April 25, 1964

Dear Mr. Young

I have an application for leave to appeal under the post conviction procedure act which is docketed at No 18 Sept term 1964. Since the opinion by Judge Sodaro is based on assertions contrary to the trial testimony which is in the trial transcript.

After considering the opinion and the transcript I feel that this appeal is worthless since the statements in the opinion are far from being true, this being so I feel it is the wiser course to refile again in the lower state court and since I can not have two actions pending at the same time I must withdraw my application for leave to appeal.

I am sorry I waited so late to make up my mind but I am no lawyer and it took me quite some time to make the wiser decision.

Yours Very Truly

/s/ BENNIE JOE HAYDEN

[fol. 76]

EXHIBIT E TO ANSWER

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

BENNIE JOE HAYDEN

vs.

No. 1493-A MISC. DOCKET No. 2

WARDEN

MARYLAND PENITENTIARY

MEMORANDUM OPINION—May 13, 1964

Bennie Joe Hayden has made application for the issuance of the Writ of Habeas Corpus. His contention is that his arrest and search of his home and the seizure of evidence therefrom was invalid and illegal. This Court was advised that Hayden has filed several applications for habeas corpus in Federal Courts and also had a Post Conviction Hearing before Judge Sodaro, which was appealed and the Court of Appeals sent the case back to Judge Sodaro for a determination as to the Defendant's arrest and incidental search and seizure thereto. A hearing was held before Judge Sodaro and this Court has received a copy of his findings of fact. Judge Sodaro held that the arrest, search and incidental seizure on the premises were legal. The Petitioner had the right of appeal from this decision which was filed on March 19, 1964, to the Court of Appeals. There is no need for this Court to hold a hearing on Defendant's Petition as all the witnesses having any knowledge of the arrest, the search and the seizure were present before Judge Sodaro and from the testimony reviewed in his Opinion, there would be no question whatsoever in this or any Court's mind that would show the constitutional rights of Hayden had been violated. The Petition for the issuance of the Writ is hereby dismissed.

D. K. McLaughlin

Dated: May 13, 1964.

ORDER OF COURT

The Court has received an application for the issuance of a Writ of Habeas Corpus, which application has been filed and made a part of the record in this case.

After consideration, the application is hereby dismissed this 13th day of May, A. D. 1964 for the reasons stated in the Opinion attached hereto.

D. K. McLaughlin

Dated: May 13, 1964.

[fol. 78]

EXHIBIT F TO ANSWER

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY,
MARYLAND

STATE OF MARYLAND Ex rel: :

BENNIE JOE HAYDEN :

Petitioner :

vs. :

Law No. 23,364

WARDEN, :

MARYLAND PENITENTIARY :

Respondent :

OPINION AND ORDER OF COURT—June 12, 1964

Bennie Joe Hayden applied to this court for issuance of the Writ of Habeas Corpus in a petition dated May 19, 1964, which raises the matters of illegal search, seizure, trial, conviction and sentence. This petition, along with its letter of enclosure dated May 27, 1964, the trial transcript and a supplementary letter of May 29, 1964, would seem to substantially comply with Rule Z42, Maryland Rules of Procedure, Application—Form and Content.

The application is dismissed pursuant to Rule Z44(2), When the Writ Shall Issue—Exceptions, in as much as it

appears from the opinion of Judge McLaughlin, dated May 13, 1964, which denied a similar application for issuance of the Writ of Habeas Corpus filed in the Circuit Court of Washington County, that the legality of the petitioner's confinement was determined by Judge Sodaro under the Uniform Post Conviction Act. In that proceeding Judge Solaro held that the arrest, search and incidental seizure on the premises were legal. The petitioner appealed from that finding on March 19, 1964 to the Court of Appeals.

The new points raised by petitioner relate to the hearing under the Post Conviction Act; namely the failure to hear from several witnesses he deems vital to his case. This would not be a meritorious objection in the absence of some special circumstances, but in any event it can not be [fol. 79] pursued until the petitioner's appeal under the Post Conviction Act is disposed of by the Court of Appeals.

It is thereupon this 11th day of June, 1964, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Application for issuance of the Writ of Habeas Corpus in this matter be, and the same is hereby denied and the petition is dismissed. Leave to file in Forma Pauperis is hereby granted.

/s/ WM B. BOWIE ●
Judge

[fol. 80]

EXHIBIT G TO ANSWER

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY,
MARYLAND,

STATE OF MARYLAND Ex rel: :

BENNIE JOE HAYDEN :

Petitioner :

vs. :

Law No. 23,364

WARDEN, :

MARYLAND PENITENTIARY :

Respondent :

OPINION AND ORDER OF COURT—June 30, 1964

Bennie Joe Hayden has again applied to this court for issuance of the Writ of Habeas Corpus following our dismissal of his prior application on June 11, 1964.

On June 11, 1964 we found the legality of Hayden's confinement had been determined by Judge Sodaro under the Uniform Post Conviction Act, and that his objections pertaining to a lack of vital witnesses, while not being a meritorious objection in the absence of special circumstances, could not be pursued until his application for leave to appeal had been disposed of by the Court of Appeals. Judge Sodaro's finding was one of fact pursuant to the mandate from the Court of Appeals in *Hayden v. Warden*, 233 Md. 612.

Hayden's current petition informs the court that he withdrew his application for leave to appeal on April 24, 1964 because the testimony of Officer Parrish was not fact according to the transcript of the original trial. Regardless of the merit of this allegation, Hayden, who was represented by court appointed counsel, was free to contradict Officer Parrish while he was on the witness stand and to impeach his credibility with the trial transcript itself. In short, Hayden has had his day in court on the issue of illegal arrest, search and seizure and all of his objections to the conduct of that hearing must be addressed to the

court with jurisdiction to hear them. That jurisdiction is reposed only in the Court of Appeals.

[fol. 81] Pursuant to Rule Z44, it is thereupon this 29th day of June, 1964, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Application for issuance of the Writ of Habeas Corpus in this matter be, and the same is hereby denied and the petition is dismissed. Leave to file in Forma Pauperis is hereby granted.

/s/ Wm. B. BOWIE
Judge

[fol. 84]

IN THE CRIMINAL COURT OF BALTIMORE

P. C. P. A. Petition #452

STATE OF MARYLAND,

vs.

BENNIE JOE HAYDEN.

Indictment No. 1259, of 1962
Robbery with deadly weapon, etc.

Excerpts From Stenographic Transcript

Before: Honorable Anselm Sodaro.

March 19, 1964

[fol. 92] The Witness: Officer Marvin Parrish, Northwestern District.

Direct examination.

By Mr. Bricker:

Q. On March 17, 1962, you made the arrest of Bennie Joe Hayden, the defendant, is that right?

A. Yes, sir.

Q. At 2111 Koko Lane?

A. That's right.

Q. Under what circumstances did you arrive at that address and take into custody Mr. Hayden?

A. I will have to refer to the records because of the lapse of time. About 8:05 A. M. on March 17, 1962, I was operating radio car #61, which was manned by me and Officer John Duerr. We received a call to Diamond Cab Company, 1920 Ashburton Street, a holdup. We were in response to this call, and received further information from the police radio that the colored subject, described wearing a light hat and dark jacket ran to 2111 Koko Lane.

The Court: Repeat that. You had information about what?

[fol. 93] The Witness: We received further information from the dispatcher over police radio that the subject was being pursued, and further information stated he ran into the dwelling at 2111 Koko Lane.

By Mr. Bricker:

Q. Is it not true the information you received on the police radio was another cab driver, named Sol Sargowitz saw the alleged holdup man run west on Walbrook Avenue, and that he was followed by apparently two other cab drivers, who kept him in sight until he arrived at 2111 Koko Lane?

A. That's correct.

Q. That is the information you got?

A. Yes, sir.

Q. Acting upon that information, you went to this address, is that right?

A. That's right.

Q. What happened at your arrival at 2111 Koko Lane?

A. Upon arrival we knocked on the door. A lady identified as Joyce Hayden let us in. We asked her if she was the lady of the house. She said, "Yes." "Was her

husband home? We would like to speak to him." So, we [fol. 94] went upstairs, and that's where we found the defendant in bed in a rear bedroom.

Q. You made a search of the premises?

A. After waking Mr. Hayden up and asking him would he accompany us to the station house.

Q. And found this gun and shotgun?

A. That's correct.

Q. And found a clip of eight bullets from a P-38 and a hat and sweater?

A. That's right. He was later identified by this cab driver who kept him under observation from the time he left the Ashburton—

[fol. 95] Cross examination.

By Mr. Campanaro:

[fol. 96] Q. Why did you go into the house?

A. She admitted us.

Q. For what purpose? Did you tell her you were going to search the house?

A. At that time, no, we didn't.

[fol. 97] Q. Then you proceeded to search?

A. At the time we entered we went upstairs to find whether Mr. Hayden was there.

Q. Did you have a warrant to go into the house?

A. We didn't have to, no, sir.

Q. Did you have a warrant for searching the house?

A. We didn't have a warrant at that time.

Q. Is it not a fact you searched the house before you placed Hayden under arrest?

A. No, we did not.

Q. You are positive of that?

A. I am positive.

Q. How many policemen went to the house the first time?

A. Only two. Then two or three more responded.

Q. So, four or more policemen came with you and Officer Duerr into the house at the same time?

A. I would say approximately the same time.

[fol. 107]

EXHIBIT D TO ANSWER

[Letterhead of]
COURT OF APPEALS OF MARYLAND

ANNAPOLIS, MD. 21404

TELEPHONES: 263-4261
263-2411

(Emblem)

J. LLOYD YOUNG
CLERK

JAMES H. NORRIS, JR.
CHIEF DEPUTY

OLIVE JANE RICHARDS
VIRGINIA STEHLE HUBBARD
MARY J. MORRIS
DEPUTIES

April 29, 1964

Bennie Joe Hayden #7529
Maryland Penitentiary
954 Forrest Street
Baltimore, Maryland 21202

Re: Application for Leave to Appeal No. 18,
September Term, 1964.

Dear Sir:

In accordance with the instruction contained in your letter of April 25th, 1964, we have this date withdrawn the

above entitled application in your name and returned the record to the Criminal Court of Baltimore.

Very truly yours,

/s/ JAMES H. NORRIS, JR.
Chief Deputy

JHNjr/mjm

cc: Office of the Attorney General
Administrative Office of the Courts
State's Attorney for Baltimore City

[fol. 108]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 14388

BENNIE JOE HAYDEN,

v.

WARDEN, MARYLAND PENITENTIARY.

OPINION—March 3, 1965

Alva P. Weaver, III, court-appointed, for petitioner.

Thomas B. Finan, Attorney General of Maryland, and
Franklin Goldstein, Assistant Attorney General, for re-
spondent.

THOMSEN, Chief Judge:

Petitioner (Hayden) is serving a sentence of fourteen years in the Maryland Penitentiary following his conviction by Judge Manley in the Criminal Court of Baltimore

of robbery with a deadly weapon. In his present petition for a writ of habeas corpus and at the hearing thereon he pressed five contentions: (1) that his arrest was illegal; (2) that a search of his house and the seizure of guns, ammunition and clothing made at the time of his arrest was illegal; (3) that his representation at his trial in the Criminal Court was inadequate, because no objection was made to the introduction into evidence of the material so seized; (4) that the prosecuting witness failed to identify him; and (5) that the indictment was based on hearsay.

In view of various proceedings in the State Courts and the failure of Hayden to enter or to press certain appeals or applications to appeal to the Court of Appeals of Maryland, there is serious doubt as to what questions Hayden is entitled to raise here. Nevertheless, this Court has per-[fol. 109] mitted Hayden and his counsel to offer in evidence whatever testimony and exhibits they wished to offer, including the transcripts of his trial in May 1962 and of the hearing before Judge Sodaro in March 1964. There is some conflict between the testimony of the witnesses given at the trial and their testimony in this Court, largely due to the lapse of time. As Hayden's wife recognized on the stand, she did not remember all the details after three years. Neither did the busy police officers. Hayden himself is not a trustworthy witness. From all the evidence, after weighing the credibility of the witnesses, this Court finds the following facts.

On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition for both weapons. About 8 a.m. on March 17, armed with the pistol and perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some \$363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them followed him several blocks to his

home at 2111 Koko Lane, which one of the drivers saw him enter. The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house [fol. 110] which Hayden had entered; the officers knocked at the door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to speak to her husband and search the house. She offered no objection. Based upon the testimony offered before him at the Post Conviction Procedure Act (PCPA) hearing, Judge Sodaro found that Mrs. Hayden "gave the policeman permission to enter the home". The fuller evidence before this Court is conflicting, but this Court need not decide whether to accept the State Court's finding of that historical fact, nor resolve the conflict in the testimony, because it is clear that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house; under the law discussed below, they were justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery.

Hayden was feigning sleep in the back room on the second floor. Two or three officers roused and questioned him, and when the officers who were searching the first floor and the cellar reported that no other man was in the house, they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the

officer who was searching the cellar for a man or the money found a jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place, [fol. 111] in a washing machine.

Hayden was arrested and taken to the police station, along with the items referred to above. He made no admissions to the police. He was represented by counsel at his preliminary hearing, and after his indictment engaged an attorney with wide experience in criminal cases to represent him at his trial.

The victim could not identify Hayden, but described the clothing worn by the robber, and testified that the weapon held by the robber had a barrel like the P .38. The two taxi drivers identified Hayden as the man they saw running from the scene of the robbery. Several police officers testified, and the guns, ammunition and clothing seized at the time of the arrest were admitted in evidence without objection. The strategy of Hayden's trial counsel was to question the identification of Hayden and to attack the credibility of the important State witnesses by vigorous cross-examination with respect to the color of the clothes and other matters. He felt that there were reasonable grounds for the arrest and the search, and since the explanation which he had for the pistol included the shotgun, felt there was no point in objecting to the introduction into evidence of the gun and its ammunition. The introduction into evidence of the sweater helped rather than hurt Hayden; the State might have been criticized if it had failed to produce the sweater, which was found under the mattress and was not like the clothing described by the victim and other State witnesses. Judge Manley postponed the closing of the testimony so that the defendant might produce Miller. After argument on May 28, 1962, Judge Manley found Hayden guilty of robbery with a deadly weapon.¹ Sentence [fol. 112] was postponed pending a possible motion for a

¹ The reasons Judge Manley gave for his findings are set out in the transcript of the trial, pp. 152-154.

new trial, but after Hayden had discussed the matter with his trial counsel he decided not to file such a motion. He was sentenced on June 8, 1962, to a term of fourteen years, accounting from March 17, 1962.

Contrary to the testimony of Hayden, this Court finds that his trial counsel advised him of his right of appeal, and told him how he might proceed in forma pauperis. Hayden, however, decided not to appeal, probably because the sentence might have been considerably longer, but parted with his counsel on the note that they would seek parole after three and a half years.

As soon as Hayden reached the penitentiary he received "legal" advice from his fellow inmates, and filed a petition under the PCPA in less than three weeks, on June 28, 1962. Before that petition could be heard he filed, on August 8, 1962, a motion to strike the conviction and sentence. The latter motion was heard first and was denied on November 14, 1962. An appeal from that denial was dismissed on January 17, 1963.

On April 23, 1963, an experienced attorney was appointed to represent Hayden in his PCPA proceeding. In his amended petition for relief therein he asserted: (1) that his home was forcibly entered and searched; (2) that the prosecuting witness failed to positively identify him; (3) that the *nolle prosequi* by the State of a count in the indictment was proof of innocence; and (4) that he had been denied a speedy trial. At the post conviction hearing, he further asserted (5) that he was indicted on hearsay evidence and (6) that he was dissatisfied with the services of trial counsel for failure to object to hearsay evidence produced at the trial.

Judge Sodaro disposed of all of those contentions after a [fol. 113] hearing at which no testimony was taken. Only two of his rulings are important here: (1) Judge Sodaro held that "questions of the legality of search and seizure relating to the admissibility of evidence obtained by an allegedly illegal search and seizure should have been raised

at the trial, and are not grounds for relief under the Act"; and (6) after noting that Hayden had testified that he was not satisfied with the services of his attorney because the attorney had failed to object to hearsay evidence at the trial, Judge Sodaro stated: "This is a bald assertion unsupported by any specifics, and is also without merit. He does not claim that his attorney for any other reason was incompetent or failed to properly represent him."

Leave to appeal from Judge Sodaro's order was granted and the case was remanded for further proceedings. *Hayden v. Warden*, 233 Md. 613, 195 A.2d 692 (1963). The Court of Appeals said:

"For the reasons stated by Judge Sodaro in the lower court, we agree that the applicant was not entitled to post conviction relief for any of the reasons stated in the second through the sixth contentions, but this may not be true with respect to the first contention, concerning the search of his home and arrest without a warrant which the applicant subsequently stated was his basic contention.

" * * * We think the question should first have been considered as one of fact rather than a question of law."

On remand, Judge Sodaro granted a hearing, at which petitioner, represented by experienced counsel, testified. His wife wrote that she had moved to Detroit and was unable to attend the hearing. Hayden did not suggest that any effort be made to take her deposition. She had testified at the trial, and Hayden was evidently satisfied with that testimony. Officer Parrish was the only officer who was called to testify by either side. On March 19, 1964, Judge [fol. 114] Sodaro filed an order denying relief, in which he set forth specific findings of fact with respect to the arrest and the search and seizure, and as a result of his findings of fact, "concluded that the Petitioner's contention is without merit and that his arrest was legal and that the search

of his home and the seizure of the articles in question were proper."

On March 24, 1964, Hayden filed an application for leave to appeal from Judge Sodaro's order. On April 25, however, Hayden sent a letter to the Clerk of the Court of Appeals of Maryland requesting the withdrawal of the application for leave to appeal. His request was granted on April 29. Hayden thereupon filed three petitions for writs of habeas corpus, one in the Circuit Court for Washington County and two in the Circuit Court for Prince George's County, all of which were denied.

Meanwhile, Hayden had filed two petitions for writs of habeas corpus in this Court, one of which was denied by me on February 4, 1963, and the other by Judge Winter on September 10, 1963, both because Hayden had not exhausted his State remedies.

His State remedies are now exhausted. It is a close question whether failure to appeal from his conviction and his withdrawal of his application for leave to appeal from Judge Sodaro's second order were deliberate by-passes of available State remedies within the meaning of *Fay v. Noia*, 372 U.S. 393 (1963), *Hunt v. Warden*, 4 Cir., 335 F.2d 936 (1964), and *Pruitt v. Peyton*, 4 Cir., 338 F.2d 859 (1964). Hayden is intelligent, familiar with legal terms and concepts, an avid reader of Supreme Court reports, and an untrustworthy witness. The Court of Appeals of [fol. 115] Maryland had already ruled in his favor on one appeal. From the evidence, however, I do not find such a deliberate by-pass or waiver as would prevent his raising in this Court the issues of illegal arrest and illegal search and seizure.

(1) *Legality of Arrest*. This Court would be justified in accepting the findings of historical fact made by Judge Sodaro on that issue following the second hearing before him, which met all of the tests set out in *Townsend v. Sain*, 372 U.S. 293 (1963). However, as noted above, this Court need not decide whether to accept the State Court's find-

ing that Mrs. Hayden "gave the policeman permission to enter the home" nor resolve the conflict in the testimony in this Court on that point, because this Court has found from the evidence that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house. They were therefore justified in entering the house after announcing their authority and purpose, whether or not permission was given. *Beck v. State of Ohio*, 376 U.S. 905 (1964); *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925); *Chappell v. United States*, D.C. Cir., — F.2d — (1965); *Miller v. United States*, 357 U.S. 301 (1958); *Davis v. State*, 236 Md. 389 (1964); *Mulcahy v. State*, 221 Md. 413 (1959); see *Ker v. California*, 374 U.S. 23, at 37 et seq., *Ralph v. Pepersack*, 4 Cir., 335 F.2d 128 (1964).

(2) *Extent of the Search.* Under the evidence the officers were justified in searching the house not only for the man who had been seen entering the house, but also for any weapons he might have used and for the fruits of the crime, the money taken from the victim. The search was made incident to the arrest, and within a few minutes [fol. 116] thereof. The clothing was found while one of the officers was in the basement looking for a man and the money; the pistol and the shotgun were found in the bathroom whose door was three feet from Hayden's room, after an officer noticed that the toilet was running continuously. The search and seizures were not unreasonable. *Harris v. United States*, 331 U.S. 145 (1947); *Abel v. United States*, 362 U.S. 217 (1960); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Ker v. California*, 374 U.S. 23 (1963); *Rees v. Peyton*, 4 Cir., — F.2d — (1965); *Collins v. Klinger*, 9 Cir., 332 F.2d 504 (1964); *Leahy v. United States*, 9 Cir., 272 F.2d 47 (1960); *Davis v. State*, 236 Md. 389 (1964). The telegram taken from Hayden's pocket at the police station was not the product of an unreasonable search, since his

arrest was legal. *Abel v. United States*, supra, at 238-239; *Baskerville v. United States*, 10 Cir., 227 F.2d 454 (1955); *Griffin v. State*, 232 Md. 389 (1963); *Williams v. State*, 229 Md. 329 (1962). See *Ker v. California*, supra.

(3) *Adequacy of Representation*. Hayden was represented at his trial by counsel of his own choosing, widely experienced in criminal cases, who exercised his best judgment as to how the case should be tried. Hayden made no objection to his counsel or to the Court at the time, and may well be held to have waived any objections to matters of strategy and tactics. In any event, his representation by his trial counsel was not so inadequate as to amount to a denial of Hayden's constitutional rights. *Snead v. Smythe*, 4 Cir., 273 F.2d 838 (1959); *Brown v. Pepersack*, 4 Cir., 334 F.2d 9 (1964); cf. *Bowler v. Warden*, 4 Cir., 334 F.2d 202 (1964).

(4) *Failure of Prosecuting Witness to Identify Hayden*. In view of the other evidence there is no merit to this point.

(5) *Indictment Based on Hearsay*. If true, and there is no evidence to support the charge, this point would be without merit. *Costello v. United States*, 350 U.S. 359 (1956).

[fol. 17] The relief prayed is hereby denied, and Hayden is hereby remanded to the custody of respondent.

Roszel C. Thomsen, Chief Judge, U.S. District Court.

[fol. 118]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Title omitted]

PETITION FOR LEAVE TO APPEAL—Filed March 15, 1965

The Petitioner, Bennie Joe Hayden, prays Leave to Appeal from the Memorandum and Order of Court denying his Petition for Writ of Habeas Corpus entered on March 3, 1965, and in accordance with the provisions of U. S. C., Title 28, Sec. 753(f), respectfully prays that this Honorable Court pass an Order directing that a transcript of the proceedings of the hearing before the Court on February 17, and 23, 1965, be furnished this Petitioner at the expense of the United States Government.

Bennie Joe Hayden 7529, Petitioner in Proper Person, Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

[fol. 120]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Title omitted]

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—
March 16, 1965

The Petitioner prays Leave to Proceed and file a Notice to Appeal in Forma Pauperis, and upon request of the Petitioner, it is hereby

Ordered, by the United States District Court for the District of Maryland this 16th day of March, 1965, that the Petitioner is granted Leave to Proceed in his Appeal in Forma Pauperis and that the Official Court Reporter tran-

scribe and furnish the record of the proceedings herein to the Petitioner, without payment of the fee therefore, but said fee shall be paid the United States of America in accordance with the provisions of U. S. C., Title 28, Sec. 753 (f) on behalf of said Petitioner in the above-entitled case.

The Clerk is instructed to send a copy of this Order to the Petitioner.

Roszel C. Thomsen, Chief Judge, United States District Court for the District of Maryland.

[fol. 121]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS
UNDER RULE 73(b)—Filed March 16, 1965

Notice is hereby given that Bennie Joe Hayden, Petitioner above-named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Memorandum and Order of Court denying his Petition for Writ of Habeas Corpus entered in this action on March 3, 1965.

Bennie Joe Hayden 7529, Petitioner in Proper Person, Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil No. 14388

BENNIE JOE HAYDEN,

vs.

FRANKLIN K. BROUGH, Warden, Maryland Penitentiary.

Excerpts From Transcript of Evidence—February 17, 1965

Baltimore, Maryland
Wednesday, February 17, 1965

The above-entitled matter came on for hearing before His Honor, Roszel C. Thomsen, Chief Judge at ten o'clock a.m.

[fol. 9] MARVIN G. PARRISH was called as a witness for and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

[fol. 10] Direct examination.

By Mr. Weaver:

Q. Officer Parrish, do you recall the date of March 17, 1962, sir?

A. Yes, sir.

Q. On that date, sir, did you have occasion to be on Koko Avenue?

A. Koko Lane.

Q. Koko Lane?

A. Yes.

Q. And how did it come to pass that you went to that address?

A. Well, about 8:05 that morning, on March the seventeenth, I was in a radio car, 61, with Officer Duerr, and we received a dispatch over the police radio to proceed to 1920 Ashburton Street, a holdup.

Q. Now, what is located at 1920 Ashburton Street?

A. That is the Diamond Cab Company.

Q. All right.

A. And on our way to that location we received additional information that a subject was being pursued, and further information we received over the radio also that the subject had entered 2111 Koko Lane.

* * * * *

[fol. 11] Q. And did this further information come over the police radio in your car?

A. Yes, sir.

Q. And from whom did it come? Do you know?

A. It was being relayed from the Diamond Cab Company to us.

Q. Was the information given directly to you from the Diamond Cab office or did it go from the Diamond Cab office to the Central and then to you?

A. It goes from the Diamond Cab to our police radio and then it's relayed to the cars.

Q. And do you know who this source of information was?

[fol. 12] A. Well, it's said that that this subject was being pursued, and we proceeded to 2111 Koko Lane after receiving this information.

Q. But this information you received over the radio call about a subject being pursued, did it describe the subject?

A. It described the subject as a colored subject, about 5 foot 8, twenty-five years, wearing a light hat and dark jacket.

* * * * *

Q. And when you got to that location what, if anything, did you find?

A. Well, upon arriving there we were met by a John Falls, who was employed by the Diamond Cab Company.

[fol. 13] Q. All right. And where was he when you got there?

A. He was in his cab, 793 was the number of the cab, and he said that the gentleman that he followed from the Diamond Cab ran into 2111 Koko Lane.

[fol. 14] Q. And there's no way you can get in or out of one of those houses except either through the front or the back? You can't go out the side?

A. That's correct.

[fol. 24] Q. Well, now, you knocked on the door and Joyce Hayden answered the door; is that correct?

A. That is correct.

Q. What conversation transpired between you and her at that time?

A. Well, at that time we told Mrs. Hayden which that we had information that a holdup man had entered that, at that address and due to the lapse of time, I cannot say exactly what we said but in regards, but she said that it would be O.K. for us to look around, and we asked her who was in the house at the present time, and she stated her husband was in bed and a small child was there also.

Q. Well, now Officer, I understand that it's been nearly three years and it's difficult to remember everything, but are you certain, sir, that you told her you were looking for a holdup man in that house or did you just ask her whether or not her husband was home?

A. I believe that we asked her just what I said. I said we had reason to believe that a holdup man had entered, had entered at that address.

Q. All right, and then did you ask her if you could come in?

A. Yes, we did.

[fol. 25] Q. And she said yes?

A. Yes.

Q. Did you tell her for what purpose you were coming in?

A. We told her that we had information that a holdup man had entered at that address.

Q. Did you tell her that you wanted to come in so that you could see if you could locate that holdup man?

A. Yes, and then she said that her husband was upstairs in bed and that she had a small child there also.

Q. All right. Did you ask her for permission to search the premises for anything other than a body or a human?

A. We asked her would it be all right if we could come in.

Q. All right. Did you tell her what you wanted to look around for?

A. Well—

Q. I mean, were you looking for a person; is that what you were interested in?

A. That's correct, at that time we were looking for a person.

Q. So that you asked her permission if you could come into the house to look for a suspect of a holdup?

A. That's correct.

[fol. 26] Q. —man who according to your information had come into the house?

A. That is correct.

Q. And she gave you permission then, according to your recollection, to come into the house to see if you could locate this holdup suspect?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. And that was the extent of your invitation into the house?

A. That's right.

Q. Is that right?

A. Yes.

Q. Now, Officer, I'm not quarrelling with you and I know that three years has gone by, but I would like to read you your testimony before Judge Sodaro and see if this in any way helps to refresh your recollection about the conversation at the door, and the question placed to you was:

"What happened at your arrival at 2111 Koko Lane?"

And the answer was:

"Upon arrival we knocked on the door. A lady identified as Joyce Hayden let us in. We asked her if she was the lady of the house. She said, 'Yes.' Was her husband home? [fol. 27] We would like to speak to him. So we went upstairs, and that's where we found the defendant in bed in a rear bedroom."

Now, I'm asking you does this conversation related before Judge Sodaro makes no mention of a holdup victim or I mean a robbery of any kind coming into the house but merely mentions the question "Was her husband home? We would like to speak to him." Does that refresh your recollection as to the extent of the conversation that you had with Mrs. Hayden when she let you in the door?

A. Well, I'm sorry but I'll have to say again due to the lapse of time I cannot remember word for word what was said at that time.

Q. All right. When you gained entrance to the house did Mrs. Hayden tell you her husband was upstairs sleeping?

A. She said he was upstairs in bed.

Q. All right. Excuse me, upstairs in the bed?

A. Yes.

Q. What did you do when she told you that?

A. At that time we proceeded upstairs.

[fol. 28] Q. And where did you go when you got to the top of the stairs?

A. We went to the rear bedroom.

Q. And when you got to the rear bedroom was Officer Duerr with you?

A. He was with me.

Q. He stayed with you then during this period of time?

A. Yes.

Q. That you came in the house and went up the stairs [fol. 29] and went to the rear bedroom?

The Court: Is it a two-story house?

Mr. Weaver: Yes, sir.

By Mr. Weaver:

Q. Is that right?

A. At this time I can't say for sure whether he stayed with me at all times.

Q. Well, I'm talking about up to the point we reached?

A. We went to the bedroom.

Q. And when you got to the rear bedroom what did you find?

A. We found the defendant, later identified as Mr. Bennie Joe Hayden, in bed.

[fol. 31] Q. Do you recall what Mr. Hayden was wearing at the time, Officer?

A. At that time he was dressed in a T-shirt and shorts.

[fol. 46] Q. Do you know whether any other officers made any search in the basement other than yourself?

A. Yes, I do.

Q. What other officer did, to your knowledge?

A. Officer John Kennedy, he made a search of the basement also.

[fol. 50] Q. Now, Officer Parrish, when you knew, when you received information that a subject had run into 2111 Koko Lane and you arrived at the front of the house and knew that the only way that one could come in or out of that house was the front or the rear, and you further knew that officers would be responding to the call and be in the rear, that you would have the rear of the house watched and the front of the house watched, why didn't you then get a warrant for arrest or to search the premises?

Mr. Goldstein: I object, Your Honor.

By Mr. Weaver:

Q. Rather than going in at that time?

Mr. Goldstein: I'm perfectly willing to argue the law with Mr. Weaver.

The Court: Let's take it subject to exception. If people [fol. 51] can't in hot pursuit pursue armed robbers we are in a desperate state in this country. Maybe that's the law. You'll have to argue the law.

Mr. Goldstein: Do I understand Your Honor to overrule my objection?

The Court: No, I didn't overrule it; I will take it subject to exception so that the whole thing can be in the record and then I expect probably to strike it out on motion.

Mr. Goldstein: If the officer knows.

The Court: I will take it subject to exception. They had the opportunity to go into all this before Judge Sodaro, and they had competent counsel. There must be some limit to the number of times that people can try these points. Go ahead.

By Mr. Weaver:

Q. Do you remember the question, Officer?

A. Yes, I do. We, like I said, let's refer back to how I got the call that a holdup had been committed and fur-

ther information got over the radio that the subject had entered 2111 Koko Lane.

Now, under the circumstances considered this is what we did; we gained admittance, the lady was co-operative, and that is how we entered the house, not against her will.

[fol. 54] OFFICER JOHN KENNEDY

Direct examination.

By Mr. Weaver:

Q. Do you recall under what circumstances it came that you went to those premises?

A. Yes, sir.

Q. Would you tell us, please?

A. Well, approximately 8:10 a.m.

The Clerk: Keep your voice up.

The Witness: Well, approximately 8:10 a.m. on the morning of March 17, 1962 a call came over the air to [fol. 55] investigate a holdup which occurred Waldorf and Ashburton.

Upon receiving this information I acknowledged the call in response. I was nearby the area and that I would also respond.

I responded to the area, upon responding we received further information on the area, on the radio, that the subject had been seen running and was being followed by a cab driver, and the information was being relayed to us by radio.

A description of the subject was given to us by radio, and also the information that the subject had run into the address on Koko Lane. Upon my arrival at Koko Lane I was met by 61 Radio Car and a cruising patrol was also at the scene.

[fol. 59] Q. And when you went into the house, what did you do, sir?

A. I immediately went into the house and I relayed to the other officers there that I would search the basement.

Q. Now, when you went to search the basement, what were you looking for?

A. I was looking for the assailant.

Q. You were looking for a man, were you?

A. I was looking for a man.

Q. All right. And did you request permission of Mr. Hayden or Mrs. Hayden or anyone in the home to search the basement?

A. No, I didn't.

Q. But you went to the basement to search for a man?

A. That's right.

Q. Did you find any man in the basement?

A. No, I did not.

Q. Did you make any search for anything else?

[fol. 60] A. I was also looking for the money.

Q. Did you find the money?

A. No, I did not. By the time I had gotten down into the basement I heard someone say upstairs, "There's a man up here."

Q. So when you're down in the basement you heard them to say they had located a man?

A. That's the information I heard, yes.

Q. All right. What did you do then?

A. By this time I had already discovered some clothing which fit the description of the clothing worn by the subject that we were looking for, hidden in the washing machine.

Q. What do you mean "hidden in the washing machine"?

A. Well, it was placed inside the washing machine, and the clothing still—the clothing still contained a leather belt and I felt that this did not appear to be a proper thing.

Q. Was there any other clothing in the washing machine?

A. No, there wasn't.

Q. Now, what clothing did you find in the washing machine?

A. I found a man's jacket, a man's pair of trousers that was sort of a greenish color that were uniform type of clothing.

[fol. 61] The Court: Well, he was looking for a man down there and saw, while he was looking for a man he saw this clothing in the washing machine.

Mr. Weaver: Right.

The Court: With a belt which is certainly enough to excite curiosity.

[fol. 68] Q. So that it's your recollection that whatever search was made of the premises was done before Mr. [fol. 69] Hayden left?

A. Yes, to the best of my knowledge. The part of the search that I was involved in was done at that time up until, my part of the search that I know of, that I recall was that I had part in was all done before Mr. Hayden was taken out of the house, and if there were any further search I don't know anything about it because at that time I took the complainant to the hospital to be treated for head wounds.

[fol. 75] Q. Officer Kennedy, now that your recollection has been refreshed about the chronology of the events, what is your present recollection of your reason for going into [fol. 76] the basement?

A. My present recollection would be that further search to determine if there was another subject in the house.

Q. Your original purpose in going into the basement was not to search for evidence such as guns, money, or clothes?

A. Well, actually, I would say, the real reason was to go to the bottom of the stairs to look for another subject, to see if there was another subject.

The Court: He has already testified that he was looking for the money.

Mr. Weaver: Yes, sir.

The Court: So that your question is not to look for money and clothes and so forth. He has not said he went to look for clothes. He said he went to look for a man and for money. So that there is nothing inconsistent.

By Mr. Weaver:

Q. Did you have any idea, Officer Kennedy, as to how much money you were looking for? Were you looking for five dollars or a hundred dollars or five thousand dollars or what?

A. No, sir. The way the information came over the air it appeared to me that a cage had been held up. The cage is a depository of money for the Diamond Cab Company. Very large sums of money are held there.

Q. So you were looking for substantial money, you [fol. 77] weren't trying—

A. Substantial.

Q. You weren't trying to find five or ten dollar bills? .

A. No.

OFFICER JOHN KENNEDY resumed the witness stand and testified further as follows:

Direct examination (Continued).

The Court: Could you see the clothes in the machine [fol. 78] before you opened the top of the machine?

The Witness: No, sir.

The Court: There wasn't a glass?

The Witness: That's right. It was a top to the machine.

The Court: And the top was closed?

The Witness: Yes, sir.

The Court: So that you opened the top before you saw it?

The Witness: Yes, sir.

The Court: There wasn't any hole in the side or glass in the side through which you saw them?

The Witness: No, sir. I saw it by opening the machine.

OFFICER EDWIN DUKE.

[fol. 79] Direct examination.

By Mr. Weaver:

Q. Officer Duke; did you have occasion on March 17, 1962 to be at the premises known as 2111 Koko Lane?

A. Yes, sir.

Q. And on that date were you operating some sort of a police car?

A. Yes, sir.

Q. Did a call over the radio direct you to those premises?

A. That's correct.

[fol. 84] Q. When you saw Mr. Hayden with the other officers, was he in bed or was he standing up or what was he doing?

A. He was up; he was out of bed.

Q. Was he dressed?

A. I believe he was not.

Q. O.K. I'm just trying to get my chronology in order. Then, after you saw that, now, what did you do at that

time?

A. Well, I asked, I said, "Did anybody find a gun?"

Q. Whom did you make that comment to?

A. Just a general comment to the officers that were in the bedroom with Mr. Hayden, and someone said, "No, we didn't find a gun yet."

Q. I just want you to tell me what you did?

A. So at that point I heard the flush tank in the bathroom running; so I've searched places before, and I figured well, maybe there was a gun in that flush tank.

So I went to the flush tank and opened it up. I found [fol. 85] two guns. I found a shotgun, a sawed-off shotgun, and I found a P .38 automatic.

Q. Now, this was—

The Court: You found two and—

Mr. Weaver: He found a P .38 automatic.

The Court: A P .38?

Mr. Weaver: A P .38 automatic.

The Court: And the other was a—

Mr. Weaver: A sawed-off shotgun.

The Court: A sawed-off shotgun.

By Mr. Weaver:

Q. And that was found in the bathroom?

A. In the flush tank in the toilet.

Q. Well, that's what I'm trying to lead him to, in the flush tank of the toilet?

A. That's correct.

Q. The flush tank, is that bowl that sits up behind the part you sit on and has water in it?

A. It has all the action in it.

The Court: And he said it was running.

By Mr. Weaver:

Q. You heard water running?

A. Yes.

Q. Now, was there a top to this flush tank?

A. Yes.

[fol. 86] Q. And did you have to remove the top to that flush tank in order to reach in to find—

A. Yes.

Q. The guns?

A. Yes.

Q. The guns were not visible?

A. No, sir.

[fol. 87] By Mr. Weaver:

Q. At the time you found these in the flush tank, where was Mr. Hayden?

[fol. 88] A. Mr. Hayden was in the bedroom.

Q. Still in the bedroom?

A. To the best of my knowledge, yes.

Q. And after you got these out of the flush tank in the bathroom, what did you do then?

A. Well, first I dried my sleeve off. I had my arm wet up to the elbow. Then I went into the bedroom and showed Officer Duerr and Officer Parrish what I found, and then I continued to search a little more in the bedroom.

Q. And you searched in the bedroom then next?

A. Yes, sir.

Q. At the time you searched in the bedroom, were Officers Duerr and Parrish still there?

A. They were still in there. They were still getting Mr. Hayden, getting him dressed, and I fished around there a little bit, looked under the mattress, and found a clip of ammunition.

* * * * *

[fol. 89] Q. And what other than the clip did you find under the mattress?

A. I can't recall. I can't recall anything under the mattress. It's been a long— It's been quite a while, and I did search further and found some shotgun shells in the bureau drawer.

* * * * *

Q. Do you recall anything about a cap or a sweater?

[fol. 90] A. I recall something vaguely about a cap or a sweater under the mattress. I'm not sure if I'm the one that pulled them out or not. Like I say, there were several officers in there, and we were going through things, and I'm not too, I'm not too sure.

Q. Well, let me ask you: After you found these items, the gun and the clip and the ammunition, did you take them into your possession and ultimately take them to the police station?

A. Yes, I did.

Q. All right. Now, after you searched the bathroom and then the bedroom, what was your next activity?

A. Well, my next activity was—

Q. When I say "activity" what did you then do?

A. My superior officer arrived on the scene, and I explained to him what I'd found, and he told me to take the articles I'd found up to the station, tag them and make a report.

Q. And then did you leave?

A. Yes, I did.

[fol. 91] Q. Now, let me see. Officer Duke, when you went to the scene of the accident or to the scene of 2111 Koko Lane, you had received information over a radio? ~

A. That's right, that's correct.

Q. What information did you receive with regard to a holdup as to the weapon used?

[fol. 92] A. Well, I understood it was a pistol. I didn't know what kind of pistol, as I recall. I don't recall whether it was a particular caliber or type or anything like that. They may have said, but it was enough information to me to know it was a gun.

[fol. 95] JOYCE HAYDEN

Direct examination.

By Mr. Weaver:

[fol. 96] Q. Now, Mrs. Hayden, do you remember the morning of March 17, 1962?

A. Yes, I do.

Q. And did anything unusual occur on that day that you recall?

A. Yes, I do.

Q. Now, would you tell His Honor, Judge Thomsen, about that?

[fol. 97] A. Well, on that morning my husband and I were in bed asleep.

Q. What time had you gone to bed?

A. I think it was around about 10:30 or 11:00 o'clock.

Q. Had your husband gone to bed with you or had he gone after you or had you both gone at the same time or what?

A. We had gone to bed at the same time.

Q. All right. What was he attired in?

A. Beg pardon?

Q. What was he wearing when you went to bed that night?

A. Shorts and T-shirt.

Q. Was that his usual—

A. That's right.

Q. —his usual method of sleeping?

A. That's right.

Q. All right.

A. There was a lot of banging at the door, and it woke me up, it frightened me, and I ran downstairs.

Q. What were you wearing when you ran downstairs?

A. Nightgown, and I had thrown my robe over me, and I ran downstairs.

I opened the door and there were several police officers standing at the door.

Q. This is the front door?

[fol. 98] A. Yes, that's right.

Q. Continue.

A. It was several police officers standing there. So one of the police officers asked me, "Did a holdup man run in here?"

And I said, "No," and they came on in the house.

Q. Did they ask you could they come in?

A. No, they did not.

Q. Did you invite them in?

A. No, I did not, the only thing—

Q. Did you give them permission to enter?

A. No, I didn't. The only thing that they asked was if a holdup man had ran in my house, and I said, "No", and they just came on in the house. So—

[fol. 100] Q. At anytime while they were looking through the house did they ask your permission?

A. No, they did not, because I told them, I said, "You have no right—" no, I said—, I said, "What are you looking for?"

So they wouldn't answer me, and I said, "You have no right to tear up my house apart like this," because even in the bed where my little boy was before I had picked him up the police officers was all up in the mattress of his bed and things like that, all pulling the curtains back and in the closet.

So I said, "You have no right to do this", and one of them told me, he said, "If you don't shut up I'm going to lock you up", like that.

[fol. 104] Cross examination.

By Mr. Goldstein:

Q. When the police came in the first time did they ask you anything, Mrs. Hayden?

[fol. 105] A. The only thing that they, one of them asked me was if a holdup man had ran into the house.

Q. Did they ask you anything about guns?

A. No.

Q. They never asked you anything about guns?

A. No.

Q. Did they ask you if your husband owned any guns?

A. No, they didn't ask me anything about guns.

Q. I show you this page of the transcript, Mrs. Hayden, and I ask you to look at this. This is a transcript of the first trial. I have shown it to your husband's attorney.

In response to a question by your husband's attorney, Mr. Freedman—

A. Yes.

Q. He questioned you, and the question was:

"Tell His Honor, don't say they questioned me, say what they said to you and what you said to them, Mrs. Hayden," and, well, I'll read the whole thing. It doesn't mean anything, "And please don't be nervous and crying, you will be all right."

"Answer: They asked me if my husband had been home all night and I told them yes. They asked me did anyone else live in the house. I said no. They asked me if my husband owned any guns. I told them no because I had never [fol. 106] known my husband to own any guns."

Do you recall saying that at the first trial that they had asked you about guns?

Mr. Weaver: Do you want to read the whole thing?

The Witness: Yes.

Mr. Weaver: That's not the whole answer; it's only a part of the answer.

Mr. Goldstein: I'll read the whole thing.

The Court: Read the whole answer.

Mr. Goldstein:

"And when they searched the first time I kept asking them what they were looking for and they wouldn't tell me. But the second time they came back I asked one of the officers what he was looking for, and he said money. So I said, you have no search warrant, you have no right to be in here tearing my things apart like this. And one of them told me to shut up or he would lock me up."

Now, I don't have the next page here with me.

Mr. Weaver:

"So then they just searched everywhere and then they left."

[fol. 107] By Mr. Goldstein:

Q. But do you recall telling the officers that your husband didn't own any guns?

A. Yes, I do, but so much was happening at the time that, you know, that I was upset.

Q. Now, going on on page 101, the question asked you by Mr. Freedman, who was your husband's attorney:

"When was the first time you knew anything about the gun, about the guns that they found?

"Answer: I didn't. When they asked me did my husband own any guns I said no."

Do you recall saying that?

A. Yes.

Q. You just previously said that they didn't ask you about guns?

A. Yes, I know that, but that was three years ago, and it's kind of difficult to remember everything.

[fol. 108] Q. Do you recall seeing the clothing that was found in the washing machine?

A. I had a week's washing in my washing machine.

Q. A whole week's washing in your washing machine?

A. Yes.

Q. And were any of your husband's things in there?

A. Of course.

Q. Do you recall which of your husband's things were in there?

A. Regular clothing, underclothes, shirts, uniforms that he worked in, socks, things like that.

Q. Was there a matching jacket and a pair of pants in there?

A. Yes, he wore, he was a truck driver, and he wore, you know, pants with a matching jacket.

Q. And was the belt left in those pants, do you recall?

A. I don't recall.

* * * * *

[fol. 109] Q. Did you at any time when the officers came in say anything to them and tell them not to come in the house?

A. I didn't have a chance to tell them not to come into the house. All they asked me, did a holdup man ran in here, and they came in the house. I didn't have a chance to say any- [fol. 110] thing.

Q. Well, you told them no, did you not, that a holdup man didn't come into the house?

A. Yes, of course, because no holdup man had entered the house.

Q. Well, how did you know that?

A. I know was nobody home but me and my husband and two children.

Q. But you were upstairs in the bedroom, weren't you?

A. My husband was in the bed with me.

Q. And you were asleep, were you not?

A. Yes.

Q. How do you no one had broken into the house or come into your house while you were asleep?

A. Well, my doors were locked.

Q. And all your windows were locked?

A. Yes, I'm pretty sure.

Q. You didn't have any air in the house at that time?

A. Any air?

Q. Yes.

A. Well, I think it was in March, it was kind of cool then.

Q. And all the windows were closed and locked?

[fol. 111] A. Yes.

Q. But you hadn't looked over the whole house, had you?

A. No, no, I hadn't.

[fol. 113] BENNIE JOE HAYDEN.

[fol. 114] Direct examination.

By Mr. Weaver:

Q. Mr. Hayden, you're the petitioner in this case; is that correct?

A. Yes.

Q. Now, in your petition you have sought several grounds for relief, asking this Court to grant the issuance of a writ of habeas corpus, and one of the grounds set forth in your petition is that you were illegally arrested.

Now, would you be kind enough to relate to His Honor, Judge Thomsen, the basis for your complaint that you were illegally arrested?

A. Well, at the time that the police arrested me I didn't feel that they had probable cause to feel that I had committed a felony, and I, at the rest of the hearing they had never referred to any specific person particularly.

They only referred to a colored subject described as wearing a light hat and a dark jacket.

This height, in reference to height and the approximate age is the first time that I have ever heard this is when I came into this Court today.

After they had gotten into the house they come up to the second floor bedroom first, and then they made a search to find out whether there was anyone else in the house, and after they found out that it wasn't anyone else [fol. 115] in the house, at this time, at this time, this is the time that I was placed under arrest, and I feel that if they had probable cause that I fitted the description of the person that they had in mind, well, why, why wasn't, why wasn't I arrested when they first saw me, why did they see whether anyone else was in the house or not.

Q. You have also asserted in your petition for relief that there was an unlawful search and seizure, a search of your premises and seizure of items belonging to you.

Would you relate to His Honor, Judge Thomsen, your basis for that allegation?

A. Well, I feel that the search was exploratory, that they had no specific items in mind that they knew of at the time of the search that was supposed to have been instrumentality of the crime.

They said, in one officer's testimony that he was, after they locked me up, that he was looking for a weapon and for any money, but they seized a lot of other things, other than the things he said he was looking for at first.

And after I got to the police station they took a telegram out of my pocket. In the way that I had a pair of pants on the telegram was in the pocket. But when they woke me up they were already in the closets and they had [fol. 116] the bureau drawers opened, and there were a lot of clothes spread on the floor like, and I had on nothing but my shorts and T-shirt.

I picked a pair of pants up and put them on and this telegram was in the pair of pants that I selected from the floor to put on.

And they searched everywhere. In my opinion they had nothing specific they were looking for, and they, in one part of the testimony, the officer, Officer Duerr he testified at the trial he was looking for anything he could find. He had no specific item in mind whatsoever.

* * * * *

[fol. 119] Q. All right. Now, Mr. Hayden, in open court today, Judge Thomsen has permitted us to amend your petition for relief to include a further ground as to the competency of your counsel in your legal representation at the trial before Judge Manley, which was back in May of 1962, beginning on the 21st of May and ending on the 28th of May.

Now, there has also been—well, strike that.

Did Mr. Freedman, did you tell or have any conversation, with your counsel, Mr. Freedman, of your objections to the introduction into evidence of these matters, of the guns and the clip, and the jacket and so forth that were

seized by the officers complaining as to whether or not they were lawful or unlawful?

A. Well, in that matter I didn't go into any extent because at that time I didn't know anything about law; but I had heard of a search and seizure warrant.

I asked Mr. Freedman when he first came to the City—Baltimore City Jail to see me, did the police, did they have a right to search my house without a warrant, and he said, "The police don't need a search warrant in felony cases. Who told you that?"

[fol. 120] I said, "Well, if they don't need one I guess it's not important who told me," and I didn't discuss it any further length.

And he asked me, "Did they find any money in your house?"

I said, "Not to my knowledge", and I told him what they did find, and he told me that I would have to take the stand and explain to the judge about these things taken out of my house.

Q. All right, now. This gun, the shotgun was in your house; right?

A. Yes, it was.

Q. Now, this was also offered in evidence at the trial?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now do you feel that the introduction of that sawed-off shotgun at the trial and the shotgun shells were—wait a minute. Wait a minute till I finish.

Mr. Goldstein: All right.

By Mr. Weaver:

Q. —were prejudicial to you and to your trial, and if you feel that way, what are your reasons for that feeling?

[fol. 121] The Witness: Well, my testimony in reference to the evidence that was taken out of my house was actually what was damaging to me, and in the conclusion of the trial Judge Manley found that the inconsistencies between my testimony and the, Joe Miller was because it was the reason of his finding me guilty, and he said that, he specifically said that the only missing, the only missing link was the money, and I don't think that's too important because anything could have happened to the money the way the man tried to hide the other things in different places, just that anything could have happened to the money, except that he referred to everything that had [fol. 122] been taken, had been used in the trial.

* * * * *

[fol. 123] Cross examination.

By Mr. Goldstein:

* * * * *

[fol. 124] Q. And somebody knocked you on the foot with a night stick. Do you know who that was?

A. I knew it was a police officer.

Q. Do you know now which police officer that was from having seen them at the trial and having seen them here today?

A. No, I cannot identify which one it was, no.

Q. And what, if anything, did he say to you at that time?

A. Well, the first thing he asked me was, he said, "How long have you been here?"

I said, "I don't understand what you mean, how long have I been here?"

He said, "We're asking the questions." He said, "We got a report that a robber ran in here."

I said, "There must be some mistake."

So only about that time, I think it was some more came upstairs, and the ones that were talking to me, the one

that came upstairs told him that "We don't see anyone else [fol. 125] in the house."

So about that time one of them, I don't know which one it was, one of them told me "That you have to go with us." He told me that I was under arrest. I didn't have anything on.

Q. Just a minute. I'll give you a chance to finish, but on that particular point you said that someone came upstairs and told you that they didn't see anyone else in the house. Now, you were here when this first officer over here testified.

Mr. Weaver: Kennedy.

Mr. Goldstein: Would you stand up, Officer?

By Mr. Goldstein:

Q. That's Officer Kennedy.

A. Yes.

Q. Do you recall whether or not he was the one who came up and said—

A. I told you that I could not identify him. It's been three years.

Q. But you recall some officer coming up and saying, "We can't find anybody else in the house", while you were still in the house?

A. Yes, yes, sir, I do.

Q. Do you recall whether or not that officer had anything with him, any of your clothing or anything of that [fol. 126] nature?

A. Well, no, I can't say because, because, see, they had the bed surrounded. They were around the bed when, when, when this was said. Now, he could not have—he didn't even have to be in the bedroom. He could have been standing in the doorway. I do not know; I can't say.

Q. Now, you say the officers told you that they thought a robber had run in there? Is that what you are saying? I didn't understand.

A. No, they told me that they had a report that a robber had ran in there.

Q. They told you that they had a report that a robber had run in there. Did you make any reply to that?

A. I told them that there must be some mistake that nobody ran into my house.

Q. Well, you were asleep at the time, weren't you?

A. That's right. I said to my knowledge.

[fol. 127] Q. Now, do you know anything about when the guns were found in the tank in the toilet?

Mr. Weaver: From personal knowledge?

Mr. Goldstein: From personal knowledge.

The Witness: You mean the exact time that they were found?

[fol. 128] By Mr. Goldstein:

Q. Do you know when they were found? Let me ask you this: Did you know that they were found before you left the house?

A. I know they were found before I left the house but before—I think it was Officer, this small one, he told me that the evidence they had was still dripping with water, and he said, "What about these?"

And I didn't say anything. So he said, "You look like a bright young American boy." I didn't say anything.

Q. You didn't say anything. He asked you if you knew anything about the guns, didn't he?

A. Yes, he asked me but at the time I didn't know whether they could search the house and I didn't want to say anything until I talked to a lawyer.

Q. And you didn't say anything?

A. I didn't say anything at all.

Q. But you did see the guns. Did you see the officers search the room, the immediate room in which you were located?

A. Well, when they woke me up they were searching.

[fol. 131] Q. Did you object to their looking around?
Did you say anything about their looking around?

A. No, sir. Neither did I give them permission.

[fol. 135] The Court: He said he didn't know anything about the law but he said he asked Mr. Freedman if people had the right to search his house without a warrant. He didn't say when and that Mr. Freedman had given him some answer dealing with felonies, that it's not necessary for a felony. I suppose at the time Mr. Freedman was talking about arresting, but it's all so vague that you can't [fol. 136] make much out of it, but if Mr. Goldstein wants to—

Mr. Weaver: All right, I'll withdraw the objection.

The Court: —if he wants to tighten it up, it's all right with me.

Mr. Goldstein: Your Honor, we're just trying to get out the facts.

The Court: All right. Go ahead.

The Witness: I specifically asked him about the search. I didn't know anything about arrest at the time. I asked him about the search.

By Mr. Goldstein:

Q. When did you ask him that?

A. When he came, the first time he came to the City Jail.

The Court: When was that?

The Witness: I don't remember the date, sir.

The Court: All right.

By Mr. Weaver:

Q. How long after you had been placed in the City Jail? The day after you got there? A week after you got there or what?

A. Well, I went over to the City Jail on Monday, March 19th. I'm fairly certain this was before the week was out that I saw Mr. Freedman.

[fol. 137] By Mr. Goldstein:

Q. And he came in and talked with you; is that correct?

A. Yes.

Q. And did he ask you about the entire course of events on the day that you were arrested?

A. Yes, sir.

Q. Did you tell him everything that happened?

A. Yes, sir.

Q. And then you say you asked him about whether they could search your house; is that right?

A. I asked him that first. That's when I—that's the first thing I asked him, and he asked me did I give a statement, and I'm certain that this, the first question I asked him about the search and this was all I was interested in at the time.

Q. And you say he asked you if you gave a statement?

A. Yes, I think he did, yes.

Q. And did you tell him that you didn't give a statement?

A. Yes.

Q. And you said he asked you about whether or not they found any money?

A. Well, after he, I asked him about the search, and he told me the police didn't need a search warrant on a felony, [fol. 138] and then he asked me did they find any money, and I said, "Not to my knowledge."

I don't remember any more discussion about the search warrant but we did talk over about what they taken out of my house.

Q. You did tell him exactly what they found in your house?

A. Yes, sir.

Q. And you told him about the guns?

A. I told him about everything.

Q. About everything?

A. Yes, sir.

Q. At that time you knew everything they had found in your house?

A. Yes, because they had mentioned it at the preliminary hearing.

[fol. 139] Q. I see. And how many times did Mr. Freedman come to see you while you were in the City Jail?

A. He came to see me several times.

Q. Do you recall how many?

A. No, sir, but he came several times.

Q. Did you ever tell him to do anything that he didn't do?

A. No, sir, I didn't do anything specific to ask him to do myself, you know. If anything needed to be done he was the lawyer and he should know.

Q. He questioned you about the entire circumstances, did he?

A. Yes, he did.

Q. Did you ask him to bring any witnesses in that he didn't bring in?

A. No, sir, not to my knowledge. There was one witness was there for me but the judge at the time of the hearing said that he would, he said he wanted to get this witness there to keep from making a claim later that I was denied [fol. 140] a witness.

At that time the judge suggested getting the witness in, Mr. Freedman stood up and said, "That's all we can do," so it was Judge Manley was the one that more or less insisted that they get the witness.

Q. You're talking about Joe Miller?

A. Yes.

Q. Mr. Freedman represented you throughout your trial, did he not?

A. Yes, he did.

Q. Did you make any suggestions to him during the course of the trial?

A. Not to my knowledge because I wouldn't have any way because if I go to the doctor I'm going to listen to what the doctor says, and if I'm not sick or something I don't need a doctor. See, he was the lawyer; I wasn't the lawyer.

Q. Now, when the trial was concluded did you and Mr. Freedman have any discussions?

A. Not that I remember, no, sir.

Q. Did Mr. Freedman discuss with you the possibility of a motion for a new trial?

A. Well, at the time that Mr. Freedman actually the motion for a new trial, he told—all he said, "I'm going to talk to the judge," and he came back and he said, "You won't be, you won't be sentenced today."

[fol. 141] You have to understand that I had never been in court before. I read, I read the court docket entry and I see where the sentence was deferred pending possible motion for a new trial; but at this time I did not know that this, what was going on, but I did talk to him about it, about a new trial.

The Court: You did talk to Mr. Freedman about a new trial?

The Witness: Yes, sir.

The Court: And I thought you just said a moment ago that you had no discussion with him after the trial?

The Witness: I didn't know what, specifically what he was talking about, Your Honor.

The Court: All right, you did have some discussion with him about a motion for a new trial?

The Witness: Yes.

[fol. 142] Q. You said that you did have a discussion with Mr. Freedman about the trial; is that correct?

A. Yes.

Q. About a new trial?

A. Yes.

Q. Did he talk with you about that?

A. Yes.

Q. In Judge Manley's courtroom?

A. No, sir.

Q. When did he talk to you about that?

A. Down in the bull pen, the bull pen lockup.

Q. When? The same day?

A. It was between the time that I was convicted and the time that I was sentenced; so it has to be the same day.

[fol. 143] Q. The same day that you were convicted?

A. That I was convicted.

Q. The same day that you were convicted?

A. Yes.

Q. I think that was the twenty-eighth?

A. I don't remember the date.

Mr. Goldstein: The transcript is in evidence.

The Court: The same day he was convicted.

By Mr. Goldstein:

Q. Now, what did he say to you about a motion for a new trial?

A. Well, he didn't discuss it to any great length. All he said was, I think, that he said that "Judge Manley is about the best judge you got over here and I think that we got everything that we can hope for," and he said, "You wouldn't want a new trial." He said, "The only thing you could do was to get, was if you could get one," and he said, "Which I doubt, you would only get twenty years," and he said, "You don't have a record, and Judge Manley is not going to give you a lot of time, I don't believe."

That's what he said; that's the last time we discussed it. That is, when I went back up the penitentiary I still didn't know that the sentence had been deferred for the new trial, and I asked him again on this date I said, "I don't feel that the trial was beneficial to me; I don't think that I had [fol. 144] a fair trial."

I didn't know anything specific to tell him. So he said, "Well, it's too late for a motion for a trial, a new trial now."

And then we went on up to the sentence, and the reason I didn't know it wasn't too late was because I didn't know that he had actually had the sentence deferred, and no doubt he told the Judge. I didn't understand what they were doing.

I was under the impression that I was just going back to the City Jail and not to be a sentence, and for what reason I didn't know.

Q. Now, when Mr. Freedman discussed the new trial with you, you indicated that he indicated, that he indicated that it wouldn't do much good. Did he ask you whether or not you wanted a new trial or didn't want a new trial or did you agree with that suggestion?

A. I don't remember whether I agreed with it; all I know I didn't consider the issue any further.

Q. And you didn't discuss it any further with him?

A. No.

Q. Did Mr. Freedman at any time discuss with you the possibility of appeal to the Court of Appeals of Maryland?

A. No, sir, no, sir.

Q. After the sentencing on the day that you went back [fol. 145] to be sentenced, did he say anything to you?

A. After I was sentenced?

Q. Yes, to fourteen years?

A. Yes, he told me "to go to the institution, keep your nose clean, and see you in three-and-a-half years."

Q. Did he discuss appeal with you at all?

A. No, sir.

Q. Did you ask him anything about an appeal?

A. No, sir.

The Court: Three-and-a-half years? Do you know or did he explain what he meant by that?

The Witness: I'm certain he meant parole, Your Honor.

By Mr. Goldstein:

Q. Did you ask him to do anything further at that time?

A. No, sir, I didn't.

Q. Now, you have indicated in your habeas corpus petition that when you went to the penitentiary you discussed with people there as to what remedies you might have; is that correct?

A. Not remedies, no, sir; I discussed the question of search and seizure. There was one fellow there showed me an almanac where I read about the First and Fourth Amendment, and it was then that I filed the postconviction [fol. 146] petition because that was the first time I'd ever been in an institution, and that was all that, you know, that fellows were filing them and if there was anything in them, to file, I guess.

Q. Did any of them ever discuss with you the question of appeal?

A. No, sir.

Q. You never heard about an appeal to the Court of Appeals of Maryland?

A. No, sir, not to my knowledge.

Q. Then you say you filed a postconviction proceeding; is that correct?

A. Yes, sir.

The Court: Well, what was the date of the conviction?

Mr. Weaver: May 28, 1962.

Mr. Goldstein: And the first conviction, the first one, I believe, was filed—

Mr. Weaver: Well, I'm going to object to this, sir, because I don't see the relevancy. Now, the date of the first conviction would be beyond the, would be beyond the compass of the counsel's question, and these dates were admitted at the prior hearing in any event.

The Court: Well, what was the date of the filing of the motion to strike the conviction and sentence?

[fol. 147] Mr. Goldstein: They are in my answer, Your Honor. On June 26, 1962 the petitioner filed a petition under postconviction, under the Postconviction Procedure Act.

The Court: 1962?

Mr. Goldstein: Yes, sir.

The Court: Well, there was something about a motion to strike.

Mr. Goldstein: Subsequently he filed the motion to strike, and that was heard first.

The Court: I see. On June 29, 1962—

Mr. Goldstein: He filed a petition under the Postconviction Procedure Act.

The Court: And he said he heard about his rights under the P.C.P.A. but people that you were talking to in jail or people you were talking about in the penitentiary were telling you about the law but didn't tell you anything about an appeal; is that right?

The Witness: No, sir.

The Court: And you never heard of a right of appeal?

The Witness: No, sir, because I would rather have taken an appeal had I known about appeal at the time because I would have been able to raise more questions.

The Court: And Mr. Freedman never mentioned to you the right of appeal?

[fol. 148] The Witness: No, sir.

The Court: And that the people in the penitentiary never mentioned to you the right of appeal but they told you all about the Postconviction Procedure Act, told you all about motions to strike sentences?

The Witness: No, sir, they didn't tell me all about but only—

The Court: You filed it within a month, didn't you?

Mr. Weaver: On the 26th of June is when the first post-conviction procedure—

The Court: That's within a month, wasn't it?

Mr. Weaver: Yes.

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[fol. 153] Cross examination (Continued).

By Mr. Goldstein:

Q. Now, Mr. Hayden, back on the same point you were actually sentenced on June 8th, were you not?

A. That's right.

Q. After there had been a delay pending a possible filing of a motion for a new trial; is that correct?

A. Yes.

Q. Now, when you went over to the—did you then go to the City Jail? Is that where you were taken?

A. June 8th I went to the penitentiary.

Q. You went to the penitentiary?

A. Yes.

The Court: June 8th?

Mr. Goldstein: Yes.

The Witness: Yes.

The Court: After the date of sentence?

Mr. Goldstein: This was the date of sentence.

The Court: The date of sentence.

By Mr. Goldstein:

Q. Did Mr. Freedman talk to you at all on June 8th?

A. No more than about parole is all.

Q. You didn't discuss appeal with him at all?

[fol. 154] A. No, sir.

Q. And then you went over to the penitentiary, and you began to discuss this case with other people there, did you?

A. Well, yes, sir.

Q. And while you were there you prepared a petition for relief under the Postconviction Procedure Act; is that correct?

A. Well, first someone helped me with it.

Q. First someone helped you with it?

A. Yes.

Q. Did you write it or did someone write it?

A. I wrote it, you know, supplying certain information that I would need, but at the time I didn't know, and we only have two law books over there, you know.

Q. And who was that person that you discussed it with?

A. All I know it was a boy from New York. They call him Baby-Grand. I didn't know his full name.

Q. Now, did you tell him all the facts about your case and your arrest?

A. Not all of them, no, because I didn't look at him as a lawyer more or less as someone say, "Hey, Mack, you know, you can do this, do that." This is all it amounted to, and it's going on every day over there, and after I read [fol. 155] an accident—an article in the papers, why I filed the amended petition but the first petition actually wasn't written right after, you know, was written after I learned more about it.

[fol. 156] Q. Now, I would like you to read this Point 1 in your petition?

A. Yes.

Q. And this?

A. That the petitioner opened the door and was forcibly arrested.

[fol. 157] Q. Louder.

The Court: What? That the petitioner opened the door?

Mr. Goldstein: That's what he says in this, and was forcibly arrested.

Mr. Weaver: Then this.

Mr. Goldstein: I'm going to bring that out next.

By Mr. Goldstein:

Q. Then you filed, did you not, an amendment to that?

A. I wrote a letter, the next thing, July 30th was it?

Mr. Weaver: Yes.

The Witness: And I told them that I wasn't the one that opened the door.

By Mr. Goldstein:

Q. That your wife opened the door?

A. Yes.

Q. Now, do you know why this was put in this way in this one?

A. Well, other than the fact that I was referring to the arrest in the bedroom.

Q. And the date of the first one was? The date that you filed that, to the best of your recollection was the 25th day of June?

[fol. 158] A. Yes.

Q. And you took an affidavit before—

A. Shaddock.

Q. Is that someone over in the penitentiary?

A. Yes, sir.

Q. And then you wrote this other letter, and this is all your handwriting, is it not?

A. Yes.

Q. And that is of—what date is that?

A. July 30th.

Q. 1962?

A. Yes.

Q. That you amended it?

A. Yes.

[fol. 164] Q. Did you give testimony at that hearing?

A. Yes, I did.

Mr. Weaver: The first hearing before Judge Sodaro.

The Witness: Yes.

The Court: Yes, before Judge Sodaro, and he also testified at the second hearing.

Mr. Weaver: Yes.

[fol. 165] By Mr. Goldstein:

Q. Now, Mr. Hayden, do you recall what happened after the first postconviction hearing with regard to any appeal or anything of that nature?

A. I know I appealed.

Q. You did appeal?

A. After Judge Sodaro denied it.

Q. After the first one?

A. Yes.

Q. And didn't the Court of Appeals reverse and send it back for another hearing?

A. They remanded it. They upheld his decision on the second through the sixth contentions; they remanded it to determine whether it was an illegal search and seizure and an arrest without a warrant.

Q. They sent it back at that point?

A. Yes.

Q. And you had an attorney appointed for you to represent you in the subsequent hearing?

A. Yes.

[fol. 166] Q. And did you give all the testimony that you desired to give at that hearing?

A. As best I can remember I did.

Q. And did you after that hearing take an appeal, an application for leave to appeal from that hearing?

A. Yes, I did.

Q. And did you then subsequently withdraw that appeal?

A. Yes.

[fol. 171] Q. Mr. Hayden, I show you this paper which is marked now as Exhibit C to my answer, and see if you recognize that?

A. This is what I wrote.

Q. Is this a copy of the letter which you wrote?

A. Yes.

Q. And I ask you now to look at the next one which is marked Exhibit D and ask you if that is a copy of a letter which you would have received?

A. Yes.

Q. You received that letter?

[fol. 172] A. Yes.

Mr. Goldstein: I would like to offer the first letter, Your Honor, which is marked—it's under the date of April 25, 1965—1964, excuse me.

The Clerk: It will be marked as Respondent's Exhibit 5.

(Above letter was marked Respondent's Exhibit No. 5.)

Mr. Goldstein: And the next, which is the letter from the Court of Appeals to Mr. Hayden as the next exhibit.

The Clerk: Respondent's Exhibit 6.

(Letter was marked Respondent's Exhibit No. 6.)

Mr. Goldstein: I would like to offer them both into evidence at this time.

The Clerk: They are attached to the answer.

The Court: They have not heretofore been offered in evidence.

Mr. Goldstein: No, sir, to the best of my knowledge, they were not.

The Court: There is no record, there is no indication that they have.

Mr. Goldstein: No, sir. They were filed as part of my answer from the beginning, Your Honor, but they were [fol. 173] not offered.

Mr. Weaver: They were referred to.

The Court: They don't seem to have been marked.

Mr. Weaver: They were referred to, sir. I don't recall whether they were actually marked.

The Court: All right.

By Mr. Goldstein:

Q. Now, when you wrote that letter to Mr. Young, that I have just shown you, on April 25, 1964, did you discuss that with anyone prior to writing it?

A. No, no, sir.

Q. Did anyone make any effort to get you to write it?

A. No, sir.

Q. Did anyone persuade you to write it?

A. No, sir.

Q. Did anyone threaten you or in any way request that you write it?

A. No, sir.

Q. You wrote that of your own free will?

A. Yes, sir.

Q. And this was your feeling at the time with regard to that appeal as to what you wanted to do with it?

A. Yes. As I just told you in November when you asked me the same thing, I didn't, I wouldn't accept any type of [fol. 174] information like that from an inmate, but it was, the thing, the only thing I knew to do at the time, and I remember, I remember specifically that you contended that I had deliberately failed to exhaust my State remedies or to commit a bypass, and the Judge said that I didn't, I didn't withdraw the appeal for the purpose of coming into the Federal Court and that because when I withdrew the appeal I went to the State Court and filed three habeas corpus petitions, and it wasn't until then, and the last one I filed the Judge stated in his opinion that I had my day in court and I didn't feel that there was any other avenues open for me in the State.

[fol. 175] Q. Now, Mr. Hayden, you had appealed to the Court of Appeals or made an application for leave to appeal to the Court of Appeals once before, had you not?

A. Yes.

Q. And that had been granted, had it not?

A. Yes.

Q. And you had received a new hearing, had you not?

A. Yes.

Q. And yet after having that first hearing or application for leave to appeal and winning on that point and getting a new hearing at this point in April of 1964 after receiving a new hearing you decided to withdraw your appeal; is that correct?

A. Yes, sir, because of what was in the opinion from March 19th.

The Court: That's what he said last time. That's what he said last time.

Go ahead.

Mr. Goldstein: That's what I thought.

The Court: It's a little different from what he's saying this time. He's saying now what he said before in November, that he withdrew his appeal because of what had been [fol. 176] said in the opinion or what was not said in the opinion.

The testimony the last time, as I understood it, as my notes indicate, was that he read Judge Sodaro's opinion and most of the facts were absent from the opinion, and they were contrary to the facts that he had testified to, and the witness thought an appeal would be worthless.

Mr. Weaver: That's my recollection also.

The Court: That's my note of what he said.

Mr. Goldstein: That's correct, sir.

The Court: And the question is then whether that amounts to a deliberate bypass within the meaning of these cases.

Mr. Weaver: If Your Honor please—

The Court: Within the meaning of those cases.

Mr. Weaver: Yes.

The Court: It's a question of law and fact.

Mr. Weaver: But even beyond that, sir, after he withdrew his appeal he then continued with the State Court proceedings by filing habeas corpus petitions in the State Courts, and after those were denied, then he came to the Federal Court.

The Court: Well, there is no question that he deliberately failed to go through with an appeal.

Mr. Weaver: That's correct, sir.

The Court: Now, whether that under all the circum- [fol. 177] stances is a deliberate bypass within the meaning of the Hunt and Edmonson rule is a question of law, as I see it, as to which I will be glad to hear counsel when the time comes.

I'm not saying that I think it is or that it is not.

MICHAEL F. FREEDMAN.

[fol. 178] Direct examination.

By Mr. Weaver:

[fol. 179] Q. Well, that is what I wanted to find out about really, Mr. Freedman, and if you would like time to read the transcript I would be very pleased to supply it to you, but I would like to know in your opinion, sir, why no objection was made to the admissibility of the matters seized at Mr. Hayden's home when they were sought to be introduced by the State at the time of the trial?

A. I think I can answer that. The reason for that was that Mr. Hayden's defense solely was that of mistaken identity; he was the wrong man, and in my opinion it was a sufficient case of good and probable cause for the arrest and the search and seizure, and from the standpoint of its legality I felt that the arrest and search and seizure were good and sufficient law.

[fol. 182] Q. Mr. Freedman, if you remember it, do you recall any connection between the robbery that occurred and the sawed-off shotgun?

A. I don't think the sawed-off shotgun had any connection with the robbery.

Q. Now, this was one of the items seized in Mr. Hayden's premises; do you recall that?

A. I recall that.

Q. Now, why when this was offered into evidence if it had no association or connection with the robbery, did you not object to it being offered as an exhibit on behalf of the State?

A. I did not object to it because everything that was seized in his home was produced in court to show it was found there; that's all.

[fol. 183] Q. Did you feel that everything that was seized in his home, Mr. Freedman, would necessarily become admissible at the trial of the case?

A. It could or could not be depending upon the court's ruling, how the court felt about it.

Q. Why did you not enter an objection to it?

A. I didn't enter an objection because I thought it was properly, it was proper evidence to be admitted.

Q. For what reason do you submit, sir, or did you feel that that shotgun would properly be admissible in evidence?

A. That this man, the victim testified that he was attacked with a weapon and injured, struck and beaten and injured with a weapon, and it wasn't clear as to what type of weapon it was, and it could have been any one of any number of types of weapons according to his description.

It could have been either the gun or the shotgun or any weapon that was found by the police, and that's the reason I didn't object to it.

Q. Well, if there were no evidence to tie the shotgun to the actual holdup, wouldn't that make it all the more cogent for you to object?

A. Not necessarily.

Q. —to its being admitted?

A. Not necessarily, because he was attacked by some sort of a weapon.

[fol. 187] Q. Now, after Judge Manley found Mr. Hayden guilty on May 28, 1962, did you file a motion for a new trial?

A. I did not.

Q. And what were your reasons for not doing so?

A. Because I discussed that with Mr. Hayden in the lockup, the City Jail, and I advised him of what rights he had, that we had two days in which to file a motion for a [fol. 188] new trial, the motion could be heard by all the judges of the Supreme Bench, that sentence would be withheld until after their, until they had come to a decision whether to grant him a new trial or not.

I discussed the probability or possibility of a sentence, discussed with him thoroughly after sentence what his rights were, that he could file for a postconviction or after his sentence that he could take his case to the Court of Appeals of Maryland; if he had no funds, how to proceed in that direction, that he could get in touch with Mr. Lawrence Stevens Clerk of the Criminal Court stating that he wanted to take an appeal or postconviction; and counsel would be appointed for him, if he was without funds; and after discussing it very thoroughly with Mr. Hayden, he decided not to proceed with a motion for a new trial but to take sentence.

When he did that I went and saw His Honor, Judge Manley. I think I did a good job.

He received a sentence of fourteen years when he could very easily could have gotten twenty.

[fol. 189] Q. Now, did you ever talk to Mr. Hayden about the Court of Appeals of Maryland, his right to appeal?

A. Of course I did.

Q. When did you do that?

A. I did that in the City Jail, if I'm not mistaken, I think Mr. Hayden recalls it, I'd say I'm ninety-five per cent correct, I can't say I'm a hundred per cent correct, but I visited him in the Maryland Penitentiary. I did see him in the penitentiary, and there I spent a long time with him, and by that time Mr. Hayden had had a whole list of

questions that he desired to ask me, constitutional rights, about postconviction, about appeals.

Q. Do you remember how soon that was after he was sentenced?

A. I don't think it was too long. Perhaps within a month or so he wrote me a letter, and I responded to that letter as I recall very quickly, and I went over to the penitentiary to see him.

[fol. 2] IN THE CRIMINAL COURT OF BALTIMORE

STATE OF MARYLAND,

—VS—

BENNIE J. HAYDEN.

. Indictments #1259-#1260

Excerpts From Trust Transcript of May 21, 22
and 28, 1962

Baltimore, Maryland,
May 21, 1962.

Before Honorable Michael J. Manley, J.

Appearances:

Messrs. Russell White and Benjamin L. Brown, on behalf of the State.

Michael Freedman, Esquire on behalf of the Defendant.

Mr. White: Bennie Joe Hayden, two indictments, #1259 and #1260.

The Clerk: Bennie Joe Hayden. Mr. Freedman. The plea is not guilty, court trial in each case. Thereupon:

[fol. 3] CHARLES E. MCGUIRK, * * *

Direct examination.

By Mr. White:

[fol. 4] Q. I see. Now, directing your attention to March the 17th, did anything unusual happen to you about ten minutes after 8:00 in the morning?

A. Yes, I got robbed.

Q. You got robbed. Now, where was this, and under what circumstances, what happened?

A. Going over to the cage, you know, where I keep change.

[fol. 5] A. From over the cage, back to the lunchroom.

Q. Where were you specifically when you got robbed?

A. Down in the stairwell.

Q. The stairwell where, inside Diamond Cab?

A. Diamond Cab, yes.

Q. All right. Now, what happened exactly when you say you got robbed, describe what happened as best you can recall?

A. Well, I come out the door and I got hit on the head.

Q. Came out the door and you got hit on the head. Well, what happened, do you know how you were struck on the head?

A. Yes, struck with a gun, and held the gun on me and took the money and run.

Q. And you were struck on the head with a gun, were you?

[fol. 6] A. Yes.

Q. Did you see the gun when you were struck on the head?

A. Yes, it was a thin long barrel, I don't know what kind.

Q. Well, after you were struck on the head, did you fall down or were you standing up?

A. No, I went up against the wall.

Q. You went up against the wall?

A. Yes.

Q. Then were you unconscious or conscious?

A. Yes, I wasn't unconscious, just like blurry like.

Q. Well, then, after this person struck you on the head with this gun, what happened then, what did this person do?

A. He held the gun on me and said, mother fucker, give me your money, or something like that.

Q. And then he took the money and run. What money did he take?

A. Took \$363, \$350 lunchroom money and \$13 of mine. [fol. 7]

Q. I see. And where did you have that money?

A. In my pocket.

* * * * *

[fol. 8] Q. I show you this, designated as a pistol, P 38; can you identify this?

A. I can't identify that gun, but it had a thin barrel like that.

Q. It had a thin barrel like this.

Mr. White: All right. Your Honor, at this time for identification only, like to offer this gun as State's Exhibit Number 1.

* * * * *

[fol. 10] Q. Now, were you able to identify anything about this person that robbed you with respect to clothing or anything?

A. No. The only thing I know he had like a uniform on.

Q. Like a uniform?

A. Yes.

Q. Can you describe it any further, the color or anything like that?

A. It was like a greenish, you know, like a truck driver's [fol. 11] uniform.

Q. Like a truck driver's uniform?

A. Yes, sir.

The Court: The man that held you up had a uniform on?

Witness: Yes, like a lumber jacket and pants to match.

By Mr. White:

Q. Oh, the pants and shirt matched?

A. Lumber jacket.

Q. I see. You don't recall whether he was white or colored? You recall whether the man was white or colored?

A. I honestly, I couldn't tell you, the only thing I seen was the gun after I turned around.

Q. I see. Were you sober at the time or had you—

A. Oh, yes, I don't drink at all.

Q. You were sober.

Mr. White: All right. Your witness.

Cross examination.

By Mr. Freedman:

[fol. 12] Q. And you can't even tell what kind of gun it was, can you?

A. Only by, you know, the thin barrel.

Q. It looked thinner than this, is that right, you said something about thin?

A. I couldn't say whether it was that or not.

Q. Yes. At the police station when you testified at the hearing, didn't you say you were hit with something, you don't know what it was?

A. You see, after he hit me—

Q. Yes.

A. And I turned around he had the gun right on me.

Q. So, actually, you are assuming it was a gun, you are assuming?

[fol. 13] A. Yes, sir.

Q. Didn't you, you are assuming?

A. Yes.

Q. Didn't you testify at the hearing you were hit with something, don't know what you were hit with?

A. I don't know whether I was hit with a gun.

Q. That is right, you don't know whether you were hit with a gun or not.

Now you say it was a gray uniform?

A. I said green, grey or, you know, a truck driver's uniform.

Q. There is a lot of truck drivers around there?

A. A lot of colors, I couldn't tell you either.

Q. And a lot of people around there with uniforms on, aren't there?

A. Probably is.

Q. Yes. And a lot of them around with a similar uniform to what you are talking about, a grey one, is that right?

A. Well, I couldn't say.

Q. This was light grey or green?

A. Like a greenish-grey.

[fol. 14] Q. Greenish-grey. Was it light?

A. No, dark color like a—

Q. On the grey side?

A. No, green side, green.

Q. Green.

A. Like a whipcord uniform.

Q. Whipcord, but it was green?

A. Green, yes.

Q. Green or grey?

A. Green.

Q. Yes.

A. And real dark.

[fol. 15] JOHN F. FALLS, * * *

Direct examination.

By Mr. White:

[fol. 17] Q. All right. You said you heard someone say, holdup, holdup?

A. Say holdup, holdup, say, don't let him get away. So when I heard that I looked around, I seen a man running, and they said, someone said, that is him, don't let him get away. So I immediately—

[fol. 18] Q. All right, go ahead, sir.

A. And someone said, holdup, said, don't let him get away. So, I started the cab up, and I immediately called my dispatcher, and I asked her, she said, yes, there was a—

Mr. Freedman: Objected to, relating a conversation.

By Mr. White:

Q. Don't tell us what your dispatcher said.

The Court: I will sustain it.

By Mr. White:

Q. Anyway, you called your dispatcher. What did you do then?

A. I called my dispatcher; and, after I called my dispatcher I was still watching this man was running.

Q. Did you lose sight of him at all?

A. I never lost sight of him the whole time he was running.

Q. Go ahead.

A. And this man went north on Dukeland Street.

[fol. 19] Q. Went north on Dukeland?

A. That is right, sir.

Q. Go ahead.

A. To Clifton.

Q. To Clifton?

A. That is right.

Q. Where was he when you first saw him?

A. He was headed west on Walbrook.

Q. West on Walbrook and how far, let me show you some pictures, I show you State's Exhibits 2A, B and C. And ask you if you can identify what this shows, this location here?

A. This location here is the Diamond cage in the basement here.

Q. Oh, I see. Now, how far from that was it that you first saw this man running?

A. I didn't see the man when he left that spot.

Q. Where you saw the man, when you first saw him how far was he from this location?

A. I would say, that should be about, I will say, about 60 or 70 feet from there.

[fol. 20] Q. 60 to 70 feet?

A. That is right.

Q. All right. Was it in the same block?

A. In the same block, yes, sir.

The Court: The man was on what street was that you said?

Witness: He was on Walbrook Avenue.

By Mr. White:

Q. All right. Now, you saw him running, then you said he was running west on Walbrook, then you saw him go north on Dukeland to Clifton?

A. That is right.

Q. All right. Now, go ahead from there.

A. And he went east on Clifton.

Q. Okay, east on Clifton. Go ahead.

A. Almost up to Ashburton Street.

Q. Almost to Ashburton?

A. Almost to Ashburton.

Q. Yes.

A. He turned right from Ashburton.

Q. Turned what?

[fol. 21] A. He was headed east, he was headed east on Clifton.

Q. Yes.

A. And he turned from heading east and went back to west on Clifton.

Q. Yes.

A. To Cocoa Lane.

Q. To Cocoa Lane?

A. That is right, sir.

Q. Okay. Go ahead, sir.

A. And Cocoa Lane he went in a house.

Q. Okay. What was the address on Cocoa Lane?

A. I couldn't see the address at the time that he went in. But, after he went in I moved up a little closer and I looked and seen the number was 2111.

Q. 2111 Cocoa Lane was the place he went in, go in the front door, do you know?

A. Went in the front door, sir.

Q. Were you able to describe this person at all?

A. Oh, sure, yes, sir.

Q. Do you see him in the court here today?

[fol. 22] A. Yes, sir.

Q. Would you point to him, please?

A. Sure, sitting here.

Q. All right, indicating the defendant in this case Bennie Joe Hayden. Did you know him before this?

A. No, sir.

Q. Have you ever seen him before to your knowledge?

A. That is right—I don't know whether I seen him or not, I think he is a cab driver, isn't it, I won't say I haven't seen him, but don't know anything about him.

Q. Are you sure this is the man you saw running?

A. I don't even—

Q. Indicating the defendant Bennie Joe Hayden. Do you recall what type clothes he had on?

A. He had on dark clothes.

Q. He had on dark clothes.

Mr. Freedman: Don't show him the clothes first.

By Mr. White:

Q. Well, what did he have on, I mean, in the way of clothing, what type of clothing were they?

A. Well, looked more so like a truck driver uniform, [fol. 23] something like that.

Q. Like a truck driver's uniform. Do you recall whether or not he had anything on his head?

A. He had a cap on his head.

Q. What kind of a cap was it?

A. Looked like it was a dark greyish looking cap.

Q. Something like this?

A. That is the cap he had on, yes, sir.

[fol. 24] Q. Were you able to pick anybody out of the lineup?

A. Yes, sir.

Q. Who is that?

A. I picked this man, I seen him up at Walbrook out—

Q. Indicating the defendant Bennie Joe Hayden. In addition to seeing this man run, did you notice whether he was carrying anything?

A. I didn't see anything he was carrying, no, sir.

Q. I see. Didn't see anything he was carrying?

A. No sir.

Mr. White: Your witness.

Cross examination.

By Mr. Freedman:

[fol. 30] Q. All right. Now, when you got to Cocoa Lane, aren't they all row houses, from the outside all look alike on the outside, there is a whole block of row houses?

A. There is a whole block of row houses there.

Q. Yes. And you saw from where you were away the man ran into one of the houses, is that right?

A. He ran in Cocoa Lane, 2111, that is where he went in, yes, sir.

Q. You are sure of that?

A. Positive, sir.

Q. What did you do then when he ran into 2111 Cocoa Lane?

A. I stayed there until the police arrived.

[fol. 31] Q. You stayed there?

A. Until they arrived, yes.

Q. Are you sure that was the house he went into?

A. Positively, yes, sir.

Q. And when the police arrived did you go in there with them?

A. No, sir, when the police arrived I left.

Q. You left?

A. Yes, sir.

Q. Now, at any time did you see the—you never did see the man's face, did you?

A. No more than when I was following him, sir.

Q. But, you never did see his face?

A. I seen him when I was following him.

Q. You were behind him, you were 65 feet behind him?

A. That is when I seen him, I was following him, I seen him, behind him.

Q. Behind him?

A. Yes, sir. That is right, yes, sir.

Q. I ask you again, then, you never did see his face?
[fol. 32] A. I had to see his face to identify him, sir.

Q. Look, if the man is 65 feet in front of you, and you are following him, you are behind him all the time until he ran into the house where was—

A. That is right.

Q. —where was it that you saw his face?

A. Well, he was looking back all the time he was running.

[fol. 33] Q. Now, when you got there to the house, the police came immediately, didn't they, within a few minutes?

A. Within a few minutes, yes, sir.

Q. Within about two or three minutes the police were there, is that right?

A. I don't think it was two or three minutes, but they were there not very long.

[fol. 35] JAMES O. WATERS, 603 Bridgefield Road.

Direct examination.

By Mr. White:

[fol. 36] Q. Go ahead, sir.

A. I was getting my car, I heard someone say down the street, stop that man, holdup. I entered my car, I stopped and looked around down the street and saw a fellow running towards me, approaching me.

Q. Were you able to get a good look at him?

A. He is coming directly towards me, I have got to see him.

Q. Go ahead.

A. I didn't pay too much attention when he say holdup the first time, when he said stop him the second time, this is a holdup, he come past me looking towards him, I turned

around and ran after him. I follows him west on Walbrook, he turns north on Dukeland, and I am behind him, [fol. 37] and when he get to, he goes up to Clifton and he turns east on Clifton, well, I lost him at Clifton Street, at Clifton Avenue rather. Well, I goes on down Cocoa Lane and the cab driver is parked down there. I asked him, I said, did you see where that fellow—

Mr. Freedman: Objected to.

By Mr. White:

Q. That is all right, don't tell us about any conversation you had with the cab driver. Now, do you see anybody in court that you recognize?

A. Yes, sir.

Q. Who is that?

A. The fellow sitting right by Mr. Freedman.

Q. Indicating the defendant Bennie Joe Hayden. Was he the person you saw?

A. Yes, sir.

Q. Are you sure?

A. Positive.

Q. What did he have on in the way of clothing?

A. He had on a dark uniform, sir, a two piece.

Q. A two piece uniform?

[fol. 38] A. Right, sir.

Q. And what if anything did he have on his head?

A. All I could see was a darkish grey cap.

Q. A darkish grey cap. Do you know whether he had anything in his possession that you could see?

A. Well, I couldn't see he had anything in his hands because they were swinging; and, when, I did notice when he went by that he had a paper in his back pocket.

Q. A paper in his back pocket. All right. Now, you said that you got up in the vicinity of 2100' Cocoa Lane, did you?

A. Yes.

Q. And you said you saw the cab driver parked in front of where?

A. Well, he wasn't parked exactly in front, he was at the corner.

Q. I see. At the corner?

A. Right.

Q. All right. Where did you go then?

A. I went up to his cab and asked him did he see the fellow.

[fol. 39] Mr. Freedman: Objected to.

By Mr. White:

Q. You went up to his cab?

Mr. Freedman: Objected to.

By Mr. White:

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Now, after that conversation, don't tell us what the conversation was, but after you had the conversation with him where did you go?

A. I went to the alley at the rear of Cocoa Lane.

Q. And were you observing anything when you went back there?

A. Yes, I was.

Q. What were you observing?

A. The rear of the houses.

Q. The rear of the houses?

A. Right, sir.

Q. Well, now, did you stay there until the police got there?

A. That I did.

[fol. 40] Q. Did you see anyone enter any of the houses?

A. I didn't see no one enter or come out of the houses.

* * * * *

Cross examination.

By Mr. Freedman:

[fol. 45] Q. Now, why did you go in the back of the houses on Cocoa Lane?

A. Because he asked me to watch the rear to see that he don't come out, if it not him, anyone.

[fol. 48] OFF. JOHN DUERR, * * *

[fol. 49] Direct examination.

By Mr. White:

Q. All right. Officer Duerr, directing your attention to around 8:10 a. m. on March 17th of this year did you have occasion to be working the radio car?

A. Yes, sir, I was.

Q. All right. Did you receive any call around that time?

A. Yes, sir.

Q. To where?

A. About 8:05 a. m. on March the 17th, 1962, while working Radio car 61, Officer Marvin Parrish and myself received a call to 1920 Ashburton Street, the Diamond Cab, a holdup.

Q. I see. All right. And did you talk with anyone when you got there or see anything?

A. Well, enroute to the Diamond Cab Company, we received additional information from communications over our police radio that a colored subject—

[fol. 50] Mr. Freedman: Don't tell—

By Mr. White:

Q. Don't tell us what it is, but what did you do as a result of receiving that information?

A. Well, we responded to 2111 Cocoa Lane.

Q. Went to 2111 Cocoa Lane?

A. That is correct.

Q. All right. You went straight there?

A. Yes, sir.

Q. What did you do when you got there, did you talk with anyone?

A. Upon arrival we were met by a colored female later identified as Joyce Hayden, she answered the door. We informed her that we had information and believe that a holdup man had ran into her home. She admitted us to the house and we immediately began a search of the inside.

Q. All right. And what did you find if anything?

A. On the second floor we found a colored man lying in bed dressed in white shorts and a T shirt.

Q. Who was that?

A. He was later identified as Bennie Joe Hayden.

[fol. 51] Q. All right. Do you see him in court?

A. I do.

Q. Point to him, please.

A. Right there.

Q. Indicating the defendant Bennie Joe Hayden. You say he was lying in underwear and shorts?

A. In the second floor bedroom rear.

Q. All right. Go ahead. What did you do?

A. Well, we immediately began a search in the home. We saw no other person, no other male in the home. We placed him under arrest, called for the cruising patrol, of course, and then we began a search for weapons and for any money.

Q. All right. What did you find in the home?

A. Upon searching the basement of 2111 Cocoa Lane we found the described list of articles.

Q. Did you find any weapons?

A. Yes, we did.

Q. All right. Well, what weapons did you find and where were they located in the home?

A. As to the weapons: one P 38 German automatic Luger. [fol. 52] Q. All right. Let me show you State's Exhibit Number 1 for identification, and ask you if this is a P 38 Luger you—

A. Yes, it is.

Q. Where did you find it in the home?

A. That was located in the toilet bowl tank in the bathroom.

Q. Toilet bowl tank in the bathroom?

A. The water tank, yes, sir.

Mr. White: At this time, Your Honor, we would like to offer it in evidence.

(Thereupon the afore-mentioned gun, heretofore marked State's Exhibit Number 1 for identification, was then marked in evidence.)

By Mr. White:

Q. Go ahead, what other weapons did you find?

A. Also one L. C. Smith 12 gauge sawed-off shotgun, serial number—

Q. Is this the L. C. Smith sawed-off shotgun you found?

[fol. 53] Q. Where was this found?

A. This was also in the tank of the toilet in the bathroom.

Mr. White: We will offer this, Your Honor, as State's Exhibit Number 4.

(The afore-mentioned shotgun was then marked State's Exhibit Number 4)

By Mr. White:

Q. Go ahead, what else?

A. A loaded clip of a P 38 ammunition was found under the mattress of where Bennie Joe Hayden was sleeping.

Q. All right, loaded clip for that P 38?

A. That is correct.

Q. And that is this clip here?

A. Yes, sir.

Q. Was anything inside the clip?

A. Yes, sir.

Q. You say it was loaded?

A. Yes, sir, it was.

Q. With what?

A. P 38 shells.

[fol. 54] Q. All right. And we have those, are these the shells we have wrapped up here?

A. Yes, sir.

Mr. White: We offer these in evidence, Your Honor, the clip with the shells, State's Exhibit Number 5.

(The afore-mentioned 38 clip and shells were then marked State's Exhibit Number 5)

By Mr. White:

Q. Go ahead, Officer.

A. Upon searching several 12 gauge shotgun shells were also found in the bureau drawer located in the bedroom.

Q. These are the shells you have in this bag here, 12 gauge shotgun shells you found?

A. Yes, sir, that is it.

Mr. White: We will offer those in evidence, Your Honor, as State's Exhibit Number 6.

(The above-mentioned shells were then marked State's Exhibit Number 6)

By Mr. White:

Q. Go ahead.

A. A further search where the ammunition, the P 38 am-
[fol. 55] munition was found under the mattress also a light colored cap.

Q. Is this the grey cap here?

A. Yes, sir.

Q. It was offered for identification before as State's Exhibit Number 3.

A. Yes, sir.

Mr. White: All right. We will offer this into evidence at this time, Your Honor, the cap.

(The above-mentioned cap, heretofore marked as State's Exhibit Number 3, was then marked in evidence)

By Mr. White:

Q. Go ahead.

A. And a man's dark brown sweater, size 42, was also found with the cap.

Q. Under the mattress?

A. Under the mattress.

Q. This sweater here?

A. Yes, sir.

Mr. White: We will offer that in evidence as State's Exhibit Number 7.

[fol. 56] (The afore-mentioned sweater was then marked State's Exhibit Number 7)

By Mr. White:

Q. Go ahead, find any other clothing?

A. In the basement found in the washing machine, which was not in operation, a man's dark waist jacket, waist length jacket, size 42. A man's dark pair of trousers with the belt still in same were found in the washing machine.

Q. All right, show you these two items of clothing, the jacket and the trousers and ask you if these are the items that you are referring to?

A. Those are the ones we recovered from the washing machine, yes, sir.

Mr. White: We will offer this jacket and trousers as State's Exhibit Number 8.

(The above-mentioned jacket and trousers were then marked State's Exhibit Number 8)

By Mr. White:

Q. All right, anything else?

A. That was all that was as far as we could—all the evidence we could find.

[fol. 57] Q. Did you find anything in the way of any communications or telegrams, letters or anything like that?

A. Yes, sir, the telegram was, when he was booked at the Northwest station and booked, a telegram was taken off his person.

Mr. Freedman: Objected to.

By Mr. White:

Q. A telegram was taken off his person.

The Court: Why?

Mr. Freedman: A telegram.

The Court: Well, I don't know.

By Mr. White:

Q. Well, let me show you this and ask you if this is, did you see this? Excuse me, let me show it to counsel first?

Mr. Freedman: No, I don't know what you are talking about. I don't know what they expect to prove by it but I object to it, Your Honor. You can see it is some bill or something.

By Mr. White:

[fol. 58] Q. Is this the telegram you found on his person?

A. Yes, sir, that is the telegram.

Mr. White: Well, we will let Your Honor see it and I will offer it as State's Exhibit Number 9, offered merely to show motive, Your Honor.

The Court: This is March 12th, 1962.

Mr. Freedman: I don't know what bearing it has, but whatever—

The Court: I don't either, I will overrule the objection.

(The above-mentioned telegram was then marked State's Exhibit Number 9.)

[fol. 60] Cross examination.

By Mr. Freedman:

Q. Now, Officer, you informed him what he was being charged with, is that right?

A. Yes, sir.

Q. And what did he say to you to try to prove his innocence, what did he say to you?

A. Just says, as I repeated before, that he did not leave the house, he went to bed early that night and was not awake, did not know anything until we woke him up that night.

[fol. 62] Q. What else did you look for in the house when you were doing all this searching?

A. Naturally when it is a holdup you look for a weapon.

[fol. 63] Q. What else?

A. Money.

Q. Of course, you haven't mentioned that until now. You were looking for the money, you knew that \$363 had been robbed from this man, you knew that, didn't you?

A. How did I know this, until I went to 2111 Cocoa Lane. I had not even seen the complaint.

Q. Hadn't you heard the man had been robbed?

A. I had not got to the Diamond Cab yet.

Q. You heard the man had been robbed, didn't you?

A. Definitely.

Q. You heard that money had been taken from the man?

A. No, sir, we don't get that information over the radio.

Q. Well, why were you looking for money then?

A. You assume—

The Court: Well, he didn't say he was looking for money, he was looking for anything he could find.

Mr. Freedman: Just now said he did.

The Court: Including money.

[fol. 64] By Mr. Freedman:

Q. Now he says he was looking for money?

A. Yes.

Q. Well, you were looking for money, weren't you?

A. Not exactly, looking for a weapon mostly.

Q. Were you looking for money?

A. Whatever we would find.

Mr. White: Did you find any money?

Witness: No, no.

By Mr. Freedman:

Q. That is right. Did you look in his pants?

A. We looked everywhere.

Q. And you found no money?

A. That is right.

Q. How many officers came in the house, about ten or twelve of you, weren't there, rushed into the house, eleven or twelve?

A. I wouldn't say ten or twelve, no, sir.

Q. How many?

A. Maybe five or six.

Q. Yes. And they searched the house from top to bottom, didn't they?

A. Which is customary when you receive a call like that.

Q. I am not complaining, just asking you. And how much money was found if any at all?

A. I don't believe there was any money found on the gentleman.

Q. That is right, and he said he never had robbed the man, he was not the man, didn't get any money, and he had been in the house all night sleeping in bed, isn't that right?

A. That is what he said.

Q. Yes, his wife told you the same thing, isn't that right?

Mr. White: That is objectionable, your Honor.

Mr. Freedman: In his presence.

Mr. White: She can't testify.

Mr. Freedman: She will testify.

By Mr. Freedman:

Q. She told you the same thing, didn't she?

Mr. White: Objection.

[fol. 66] The Court: Well, I will sustain the objection.

By Mr. Freedman:

Q. All right. And he protested his innocence and said he knew nothing about this robbery?

A. He did.

Q. Now, then, the only thing you know about this sweater is that you found it in the house, isn't that right?

A. Under the mattress.

Q. Under the mattress. What does that prove?

A. You keep your sweater under the mattress?

Q. What does it prove to you?

Mr. White: Your Honor, if he wants to know what it proves I can tell him.

The Court: I will sustain the objection to the question.

By Mr. Freedman:

Q. You found the cap and the uniform. Did you find this?

A. That was located, yes, sir, in the washing machine.

[fol. 67] Q. All right. What color would you say that is black, what color is that?

A. Dark blue to me.

Q. Blue? Wouldn't you say it is black? You have got good eyes.

A. So it is dark black—so it is black.

Q. Black, so it is black. Now, then, as a matter of fact—just for the record, not that it makes much difference, wasn't this gun found in the closet, this gun?

A. No, sir, I explained where the gun was, I testified as to where the gun was found.

Q. I see.

Now, did you question Hayden and ask him where he got these guns and why he had them?

A. Certainly.

Q. Explain to the Court.

A. He denied any knowledge of how the guns got into the tank or the toilet. He didn't even know they were there.

Q. You mean on the second floor?

A. In the bathroom, yes, sir.

[fol. 71] BENNIE J. HAYDEN.

Direct examination.

By Mr. Freedman:

[fol. 78] Q. Explain how you got those guns, when you got in possession of them and what you know about them. Tell His Honor Judge Manley.

[fol. 79] A. Well, the night before a fellow brought me home and his car broke down in front of my house. A police officer pulled up right beside the car and got out and asked the fellow for his driver's license and registration card because of the fact he did not have his front tag on. And he couldn't get the car started. He asked me to take

the guns into my house because the fact he had to catch a cab back home. I took the guns into my house. I went straight into the bathroom with them in a bag. This time my wife came up the stairs, that is when I put them in the tank to keep them while they were in the house.

The Court: You left them in the bag, did you?

Witness: No, sir, I took them out of the bag.

By Mr. Freedman:

Q. You put them in the tank, didn't want your wife or children to see them, is that right?

A. Yes, sir.

Q. So your wife didn't know you had placed them there, is that right?

A. That is correct, sir.

[fol. 80] Q. Yes.

Now, then, do you have a greenish grey uniform as described by Mr. McGuirk?

A. No, sir, I don't.

Q. And are these your clothes that were taken from your home, is this your suit of clothes?

A. It looks like them, that is them.

Q. Now, would you call that greenish grey or black?

A. I would call it black.

Q. It is a black suit, is that right?

A. That is correct.

Q. Yes. Now, when you were taken into custody, in the course of your conversation with the police, did you make any—did they accuse you of being the man that had perpetrated this crime, did they, when you were first accused that you were the robber in this case?

A. Well, when they first took me up they apparently make it look as if I was hiding someone in my house; but then when we got to the station house they charged me with it.

[fol. 82] Q. What did they find under your bed, how
[fol. 83] about the sweater they talk about?

A. They said they found a sweater under the mattress but this is not so because when I went in the house the night before—

Q. Yes.

A. —I took my sweater off and put it at the foot of the bed, and when they told me to get up I threw the spread back and due to all the excitement I couldn't find it because it was balled up in the spread.

[fol. 84] Cross examination.

- By Mr. White:

[fol. 86] Q. I see. Well, you got his name, didn't you?

A. I know his name.

Q. Yes. Well, where is he now?

A. No one asked me for him up to now.

Q. What is his name, where does he live?

A. Joe Miller.

Q. Joe Miller?

A. That is right.

Q. Where does Joe Miller live?

A. 1904 Patterson Park.

Q. 1904 Patterson Park?

A. That is right.

[fol. 87] Q. Well, did you inform anybody else to have him here?

A. No, I did not.

Q. Why not, didn't you think he was important?

A. No, I can't say that.

Q. Now, when the police asked you about guns at first you denied any knowledge of them, didn't you?

A. I told the police the guns didn't belong to me, I didn't lie.

[fol. 91] Q. Does this man Joe Miller work for the
[fol. 92] Molasses company?

A. No, sir, he was a gypsy driver. He worked for outfit in Pennsylvania, from Berryville.

Q. A gypsy driver?

A. He worked for another company.

Q. Well, how were you riding, how did it come about he brought you home, were you coming home from work the night before when he gave you the guns?

A. I was coming from the union hall.

Q. Oh, from the union hall?

A. Yes, sir.

Q. And you say the policeman stopped him because of some trouble?

A. No, the policeman, that is the reason he stopped because the car was sitting in the middle of the street, more or less, and he didn't have a front tag on.

Q. Oh, I see, it is the front tag. And where was that, at your house?

A. Sitting in front of my house, that is right, sir.

Q. And was there a policeman come along?

A. He pulled up there and stopped and asked him for [fol. 93] his driver's license and registration card because he didn't even know anything was wrong with the car because of the fact there was no tag on the car, that is the reason he stopped.

Q. I see. You don't know who that policeman was?

A. No, sir, I don't.

Q. And you say he left the car there?

A. Yes, sir, he couldn't get his car started, I had to push it to the curb.

Q. Then he went home in a taxicab?

A. Yes, sir.

[fol. 94] Q. This telegram that has been offered in evidence, did that have relation to your automobile?

A. No, sir.

Q. That was some other money you owed?

A. Yes, sir, that was the \$10 that I just said I left home [fol. 95] for this payment.

JOYCE A. HAYDEN.

Direct examination.

By Mr. Freedman:

[fol. 97] Q. All right. Now, when did you awaken?

A. Well, that morning it was a lot of banging at the doors.

Q. Were you asleep?

A. Yes, I was, and I woke up first, it frightened me. It was so loud, it was coming from all three of the doors.

Q. Yes.

[fol. 98] A. So, I jumped out of the bed.

Q. Where was Bennie then?

A. He was in bed.

Q. Was he awake or asleep?

A. He was asleep. I jumped out of the bed and I ran downstairs and I opened one door, and there were these officers. So, one of them said, did a holdup man just run in here?

Q. How many officers were there?

A. At the door that I opened there were about four or five.

Q. Yes.

A. And I said, no. But didn't say nothing else, just came in the house and started going through the house. So it was banging at the other doors, I went and opened the back door and some more came in. So, they went upstairs and

by that time the children were crying. They had just woken up, they were crying.

Q. Were they in the same room you were in?

A. No, they were in different rooms.

Q. Different rooms?

[fol. 99] A. I rushed up the steps to the children and when I got in there, there were some officers were in there talking to them, and they were crying, and some was talking to my husband, some started asking us questions, if my husband had been home all night, whether someone had came in the house. I told them no one had came in the house and my husband was home all night. So they asked my children questions, my five year old son, if his father had just came in the house or if he had been home all night. So, finally they kept talking to my husband, and they were still going all through the house looking at everything. And so they took my husband away from the house, and about fifteen or twenty minutes later some more came back and they questioned me.

Q. What did they question you, what did they ask you?

A. They asked me if my husband—

Mr. White: I object.

Mr. Freedman: Wait a minute.

Mr. White: This is not admissible.

Mr. Freedman: Why isn't it? The questions the officers [fol. 100] asked her.

The Court: Well, I think I will allow it in, Mr. White, I will overrule the objection.

By Mr. Freedman:

Q. Tell His Honor, don't say they questioned me, say what they said to you and what you said to them, Mrs. Hayden, and please don't be nervous and crying, you will be all right.

A. They asked me if my husband had been home all night and I told them yes. They asked me did anyone else live

in the house. I said no. They asked me if my husband owned any guns. I told them no because I had never known my husband to own any guns. So they kept looking and everything. And when they searched the first time I kept asking them what they were looking for and they wouldn't tell me. But the second time they came back I asked one of the officers what was he looking for, and he said money. So I said, you have no search warrant, you have no right to be in here tearing my things apart like this. And one of them told me to shut up or he would lock me up. So, then, [fol. 101] they just searched everywhere and then they left.

Q. They told you they were searching for money?

A. Yes, they did.

Q. Yes. Did they find any money?

A. No.

Q. Did you see any money in the house?

A. No.

Q. When was the first time you knew anything about the gun, about the guns that they found?

A. I didn't. When they asked me did my husband own any guns I said no.

Q. When was the first time, you saw these guns here, didn't you?

A. Yes.

[fol. 105] Cross examination.

By Mr. White:

[fol. 107] Q. And you didn't notice anything unusual in the bathroom between 9:30 and 11:30?

A. No, sir, I did not.

Q. I see.

Mr. White: All right. That is all.

By the Court:

Q. Had you used the toilet?

A. Yes, sir, we used the toilet.

Q. After the guns had been put in there?

A. Yes, sir.

Q. You say he came home about 9:30 the night before?

A. That is right.

The Court: All right.

[fol. 115] OFF. EDWIN DUKE.

Direct examination.

By Mr. White:

[fol. 116] Q. Are you the police officer who actually took possession of the weapons that were offered into evidence?

A. Yes, sir.

Q. All right. Now, with respect to State's Exhibit Number 1, this P 38 Luger, did you actually find this on the premises?

A. Yes, sir, I found that in the bottom of the flush tank in the bathroom.

Q. I see. Was there water in the tank or not?

A. Yes, sir.

Q. There was water in the tank?

A. Yes, sir.

Q. All right. Now, how about State's Exhibit Number 4, the sawed-off shotgun?

[fol. 117] A. The shotgun was also in the tank, it was resting on the float in the tank.

Q. I see. Was there anything unusual about the toilet?

A. Yes, sir. I heard it running, that is why I looked in there.

Q. I see. It was running?

A. Yes, sir.

Q. Did it continue to run after you took the guns out?

A. No, sir, it stopped running when I took the shotgun off the top of the float.

[fol. 123] Mr. White: The State's case in rebuttal.

Mr. Freedman: That is the case and renew our—

The Court: Has any effort been made to get Joe Miller here?

Mr. Freedman: Your Honor, the first I heard of it. I [fol. 124] don't know anything about it, in fact. My client thought that wasn't important apparently; apparently wasn't important.

The Court: I know the police did not because they knew nothing about it because their testimony was that the defendant said he knew nothing about the guns and did not know how they got in the tank. All right.

Well, you are satisfied, are you, I just want to—

Mr. Freedman: That is all we can do.

The Court: I just want to say that if you want to be given an opportunity to get this witness in and get any benefits that you may derive from his testimony, I am offering at this time to postpone the case until he can be brought in. The reason I am doing that is so there will not be any claim made later by the defendant that, in the event he is found guilty, that he did not have the opportunity to produce his witnesses.

[fol. 132] EARL J. MILLER

Direct examination.

By Mr. Freedman:

Q. Mr. Miller, how old are you?

A. 28.

Q. And did you formerly live at 1904 Patterson Park Avenue?

A. Yes sir.

Q. But, at the time of your arrest you gave the address of 923 Rutland Avenue, is that right?

A. Yes, sir, that is the house.

Q. That is the address you were known to reside in at the time of your arrest in the case in which you are now serving sentence?

[fol. 134] Q. And on March the 16th, 9:00 p.m., did you have occasion to have your car in front of his house?

A. I was around the corner from his house and my car cut off.

Q. And you couldn't drive it, is that right?

A. That is right.

[fol. 135] Mr. Freedman: What happened.

The Court: That is what he is telling.

Mr. Freedman: Yes, sir.

The Court: Tell us what the occurrence was.

Witness: Well, see, it was on Pennsylvania Avenue I left, I was going out towards Reisterstown Road, so I turned off at Carolina and North Avenue and I turned up through Poplar Grove Avenue and made a right turn at the corner. That is when it cut off, the car cut off, the lights and everything went out. So I pulled it to the curb, and a taxicab pull up behind me and I called and he asked me what was wrong? And I said it wouldn't run, almost back out in the street, in the front end, so we got there and tinker with it, and he said, your voltage regulator has gone up. And he then said he was checking in, so he couldn't [fol. 136] do any more. So I pulled the car to the curb, closer to the curb a little better. And, I thought about the two guns I had in the car. So I thought what I would do with them because I take a taxicab home.

By the Court:

Q. You mean you said to the cab driver?

A. I didn't say anything to him. He left. So I just left myself then. So I thought about what will I do about the two guns, I will catch another cab across town. So I thought about his house on the corner. I walked around there and called him to the door and asked him would he keep something for me until the next day. So he said okay, asked me what it was and I told him. He said, sure. And the next day when I went over there about 4:00 o'clock wasn't anybody at home. So I found out what had happened after I went back down Pennsylvania Avenue.

Cross examination.

By Mr. White:

[fol. 148] Q. And when you got there who was home?

A. He was there.

[fol. 149] Q. Was his wife there?

A. The kids were there, somebody, I didn't go in, just stood at the door and told him I wanted him to keep something for me until tomorrow.

Q. Yes. You didn't see his wife, did you?

A. No, sir.

Q. Well, what work were you doing at the time?

A. I was longshoreman.

Q. And what was Hayden, do you know what his work was?

A. He was driving a tractor and trailer, I think he said, a molasses truck.

[fol. 150]

STATEMENT OF THE COURT

The Court: Well, we have evidence in this case of the positive identification of Hayden by John Falls and James Waters as being the man that they saw running away from the Diamond Cab Company cage at a time when they heard

voices saying, holdup or there he goes, get him; and, a man walked right in front of Waters. He not only identified him in the lineup but both he and Falls identified him here in court.

I think I could reasonably infer that the man they saw running away from the Diamond Cab was the man that perpetrated the holdup.

Now, Falls drove in his taxicab, followed the man, and saw him go into the house at 2111 Cocoa Lane. The other man Waters, he went to the rear of Cocoa Lane and did [fol. 151] not see anyone go out from the rear or didn't see anyone go in the house from the rear. So the question is whether Hayden is the person that the police found in the house when they got there.

I might say also that McGuiirk testified that the man that assaulted him had on a truck driver's uniform. Falls said he had a dark greyish cap and a uniform of some kind. The other man said he had a two piece suit on.

When the police went in they found Hayden in bed. They found the cap, and I think it was a greyish cap. You had it here in court.

Mr. White: Yes, Your Honor.

The Court: Well, possibly, they found the cap and the jacket and the trousers in the washing machine in the basement; although I thought one of the officers had said that the cap was found under the mattress.

Mr. White: Under the mattress, that is correct, sir.

The Court: Under the mattress, found under the mattress the loaded clip. They found the two piece uniform [fol. 152] or the suit that he was wearing, in the washing machine in the basement. When the policeman went into the children's room the boy said that his father had just come in the house.

Mr. Freedman: Well, now, that was stricken out, Your Honor.

The Court: No, it wasn't stricken out, that was the testimony of Mrs. Hayden, the wife. The testimony of the wife was that Hayden came home at 9:30 the night before. But, that is still in evidence, the statement of Mrs. Hayden, that the boy said that his father had just come in the house.

The pistol and the sawed-off shotgun were found in the toilet bowl tank in the bathroom. Hayden explains that by saying that when Miller gave him the guns the night before, that he took them upstairs in the bathroom and that his wife came up; and to prevent the wife from seeing them, because she had told him that she wouldn't allow any guns around the house, he stuck them down in the toilet bowl to hide them from his wife. But, I do not have to accept that as correct, I have the right, I would think, to infer from [fol. 153] the testimony that if I find that Hayden was the man who committed this holdup and ran into the house, that in his hurry to get rid of the guns, that he put them in the toilet at that time. And, I think that would be more consistent because the wife had said that they used the toilet during the night and if the guns had been in there they certainly, overnight, they certainly would have discovered their presence there in the operation of the toilet.

There is an inconsistency in the defendant's testimony with respect to the manner in which he obtained these guns. He testified that a man brought him home the night before and the man had trouble with his car and asked him to keep the guns for him because he did not want to take them with him riding home in a taxicab. But, Miller tells us a different story. He tells us that Hayden was not with him when his automobile conked out. He was by himself, and the automobile conked out just when he was about half a City block from Hayden's home.

I think what really happened was that Miller was on his way to Hayden's home to give him the guns, and that the [fol. 154] car just conked out when he was close to his home. Hayden says he was riding home with Miller when the car conked out. Miller just says different, says Hayden wasn't with him, and that he was by himself, and he took the guns to Hayden to keep them for him overnight.

The only missing link in the whole case is the money that was taken from McGuirk, he said \$363. A lot of things could have happened to the money. It is much easier to hide away money in a place where it won't be found than

it is to dispose of guns or clothing or other things that this man attempted to dispose of, putting the clothing in the washing machine, his hat under the mattress. But, in the whole case, the fact that the State has not been able to come up with the money, it seems to me, is not sufficient to, in itself, to break down the otherwise very strong case that the State has produced.

[fol. 2]

Civil No. 14388

HAYDEN V. WARDEN

No. 10,061

Name Bennie Joe Hayden No. 7529

Address 954 Forrest Street

Baltimore 2, Maryland

M Judge Clement S. Haysworth
Street Chief Judge U.S. Court of Appeals Fourth Circuit
City Richmond 19 State Virginia

Date March 15, 1965

Dear Judge Haysworth

Inclosed please find a copie of an order denying me relief under Writ of Habeas Corpus by the Honorable Raszel C Thomsen Chief Judge United States District Court for the District of Maryland dated March 3, 1965.

It is because of this order that I am now requesting the right to appeal this order to this honorable Court in Forma Pauperis and also requesting this Court to issue a Certificate of probable Cause and appointment of Counsel, and please issue an order to the Clerk of the U.S. District Court for the District of Maryland to provide me with a Copie of the transcript of testimony at the cost of the U.S. Government, because I am a Citizen of the United States without the money to pay for these proceedings on this

appeal, and that my trial in the Criminal Court of Baltimore City in May of 1962 was not a fair trial as guaranteed by the United States Constitution. I wrote the Clerk of the District Court of Maryland and requested a Copy of the transcript of testimony in Connection with the appeal but he never answered. I also wrote Judge Thomsen and informed him that he did not make a ruling on a telegram which was also admitted at the trial against me, the telegram was taken off my persons at the police station when I was booked for investigation, the alleged robbery occurred on March 17, 1962, while the telegram was dated March 12, 1962 and it read (make payment in forty eight hours or merchandise will be repossessed) the State used [fol. 3] the telegram to show a Motive for the Crime, however Judge Thomsen did not rule on it even though the transcript of the trial and the past Conviction hearing, was filed as exhibit and the trial transcript shows on p 59 that the telegram was admitted. While I am asking this Court to rule on all five (5) Contentions raised before Judge Thomsen and also on the use of the telegram in evidence against me. I want to file again my trial transcript and the transcript of the past Conviction hearing on March 19, 1964. My wife testified at the trial that she opened the door and the police just came on in the house after they ask her did a robber run in there? The next and only other time she ever testified was before Judge Thomsen and she testified that the police did not ask and she did not give them any permission to come in or search the house. I feel the trial transcript is evidence in itself that there was no worthwhile evidence to indict because the two cab drivers did not go before the grand jury which left only the police and the victim (Charles McGuirk) and the testimony is clear that he did not identify me at the Magistrate hearing or at the trial. My Court appointed Counsel told me this Court would appoint me a Counsel, since I do not have any money I do not feel I have a right to request any certain Counsel but would be delighted to have Mr Skolo from the University of Virginia to present my ap-

peal. Please docket this appeal for me. A review of this order enclosed show that there is no mention of the telegram.

Respectfully Submitted

/s/ BENNIE JOE HAYDEN
Proper Person

[fol. 16]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 10,061

[Title omitted]

ORDER ASSIGNING COUNSEL—May 31, 1965

It is ordered that Albert R. Turnbull, Esquire, of Norfolk, Virginia, be, and he is hereby, assigned as counsel to present the appeal of Bennie Joe Hayden in the above-entitled case.

May 31, 1965.

Clement F. Haynsworth, Jr., Chief Judge, Fourth Circuit.

[File endorsement omitted]

[fol. 28]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 10,061

BENNIE JOE HAYDEN, Appellant,

vs.

WARDEN, MARYLAND PENITENTIARY, Appellee.

Appeal from the United States District Court for the
District of Maryland, at Baltimore.

Upon consideration of the petition of the appellant, by
his counsel, and for cause shown,

Leave is hereby given to the appellant to comment on
the case of *People v. Thayer*, decided by the Supreme Court
of California on December 6, 1965, and allowed to be cited
by the appellee as additional authority in the above-entitled
case by order dated December 23, 1965.

January 26, 1966.

Simon E. Sobeloff, United States Circuit Judge.

Filed Jan. 27, 1966.

Maurice S. Dean, Clerk

A true copy,

Teste:

Maurice S. Dean, Clerk, U. S. Court of Appeals for
the Fourth Circuit.

By Margaret M. Walton, Deputy Clerk.

(Seal)

[fol. 29]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 10,061

BENNIE JOE HAYDEN, Appellant,
versus

WARDEN, MARYLAND PENITENTIARY, Appellee.

Appeal from the United States District Court for
the District of Maryland, at Baltimore.

Roszel C. Thomsen, District Judge.

(Argued October 8, 1965.)

(Petition for rehearing en banc denied June 3, 1966.)

Before Sobeloff, Boreman and Bryan, Circuit Judges.

OPINION—April 21, 1966

Albert R. Turnbull (Court-assigned counsel) [Fine, Fine, Legum, Schwan & Fine on brief] for Appellant, and Franklin Goldstein, Assistant Attorney General of Maryland, (Thomas B. Finan, Attorney General of Maryland, on brief) for Appellee.

[fol. 30] SOBELOFF, Circuit Judge:

Appellant Hayden is serving a sentence of fourteen years in the Maryland Penitentiary, having been convicted and sentenced in the Criminal Court of Baltimore City in

June, 1962, for robbery with a deadly weapon. After a hearing in the District Court on his application for a writ of habeas corpus, relief was denied, and from this action an appeal was taken.

In this court the petitioner's basic contention is that certain evidence admitted at trial was the product of an unconstitutional search and seizure. The state maintains that the search and the seizure were lawful, and urges further that, even if unlawful, petitioner has waived his right to raise the issue in the federal courts because of his failure to object at trial, failure to appeal from the conviction, and withdrawal of his appeal from the state court's denial of post-conviction relief.

I

An armed robbery occurred at eight o'clock on the morning of March 17, 1962, on the premises of the Diamond Cab Company in Baltimore. Two cab drivers saw a man running from the scene and heard shouts of "hold up, stop that man." The cab drivers, proceeding independently, followed the suspected robber to 2111 Cocoa Lane. One of the drivers actually saw him enter the house. The police were immediately notified and in a few minutes arrived at that address. They had been told that the offender was a Negro about 5'8", 25 years old, and wore a light cap and dark jacket.

[fol. 31] The police knocked at the door and Hayden's wife answered. The officers told her that they had information that a holdup man was in the house. There is some dispute as to whether or not Mrs. Hayden objected to the entry of the officers. However this may be, several officers entered and went to all three floors, and when no man other than Hayden was found in the house, they arrested him. They seized a sawed-off shotgun and a pistol which they found in the flush tank of the toilet, some ammunition, a sweater, and a dark gray cap, found under Hayden's mattress, shotgun shells lying in a bureau drawer, and a

man's jacket and trousers with a belt, discovered in a washing machine in the basement. The police, however, found no stolen money.

The seized items were admitted in evidence without objection by the defendant's retained counsel. The clothing was used to fix the identity of Hayden as the man seen running from the scene of the crime and into 2111 Cocoa Lane.

Hayden failed to appeal his conviction, but upon his confinement in the Maryland Penitentiary he promptly petitioned the state court for relief under the Maryland Post-Conviction Procedure Act. Relief was denied without the taking of testimony. On appeal from this action the Maryland Court of Appeals remanded the case for an evidentiary hearing with respect to the challenged lawfulness of the search and seizure. After testimony, the post-conviction judge again denied relief, holding "that the search of his home and seizure of the articles in question were proper."

Thereupon, Hayden applied for leave to appeal to the Court of Appeals of Maryland. Before his application was acted upon, however, he requested its withdrawal. The [fol. 32] request was granted.¹ He filed the instant habeas corpus petition three months later. His right to appeal to the Court of Appeals of Maryland is now barred by time.

II

A. We deal first with the failure of trial counsel to make a contemporaneous objection to the admission of the seized articles. The state contends that the failure to object at trial constitutes a waiver by Hayden of his right to assert the constitutional claim in a federal habeas corpus proceeding. In order to preclude consideration of the constitutional claim on federal habeas corpus the state must show

¹ In the meantime, during the pendency of his application for state post-conviction relief, Hayden had filed two habeas corpus petitions in the federal District Court, both of which had been denied for failure to exhaust available state remedies.

that Hayden, acting through his attorney, voluntarily relinquished a known right by failing to object at trial² and that the failure to object constitutes an independent and adequate state ground. See *Henry v. Mississippi*, 379 U.S. [fol. 33] 443, 452 (1965), *relying on* *Fay v. Noia*, 372 U.S. 391, 438-39 (1963).³ See also *Dillon v. Peters*, 341 F.2d 337, 339 (10th Cir. 1965).

² The state in its brief speculates that the failure to object was a tactical maneuver on the part of Hayden's trial counsel. The state attributes to him a deliberate purpose to allow the admission of the clothing, so that he might create a reasonable doubt in the minds of the jurors by arguing to them that the police officers conducted a more than usually thorough search and yet were unable to find any stolen money. Hayden's trial counsel, however, testified in the District Court habeas hearing that he did not object because he was under the impression that the arrest and the search were lawful and thought the articles could not be excluded. Aside from the fact that there is a total absence of testimony to support the state's hypothesis, the tactical maneuver postulated by the state is wholly unrealistic, for the lawyer could have laid a foundation for the same argument to the jury by cross-examination of the police officers. The argument would have been readily available without subjecting the defendant to the damage obviously resulting from the admission of the clothing.

³ In *Henry*, a case coming to the Supreme Court on direct appeal from a state conviction, it was said:

" * * * a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. *Fay v. Noia*, *supra*, at 438." 379 U.S. at 452.

And at page 447 of the *Henry* opinion the Court observed:

"[It is settled] that a litigant's defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

Whether the Supreme Court has in fact abolished the "independent and adequate state procedural ground" as a basis for denying

It is unnecessary in this case to reach the question of whether Hayden voluntarily relinquished his constitutional claim, for in the state post-conviction proceedings the Court of Appeals of Maryland did not look upon the failure to object as a bar to his constitutional claim. Instead it remanded the case to the lower court for a determination of the legality of the search and seizure. *Hayden v. Warden, Maryland Penitentiary*, 233 Md. 613, 195 A.2d 692 (1963). Since the Court of Appeals of Maryland did not interpose [fol. 34] the failure to object as a bar to consideration of the merits of the constitutional issue, denial of state post-conviction relief cannot be said to rest on an independent state ground. The District Court was therefore not precluded from considering the constitutional question on its merits. Cf. *Henderson v. Heinze*, 349 F.2d 67 (9th Cir. 1965); *Nelson v. People of State of California*, 346 F.2d 73 (9th Cir. 1965); *Rhay v. Browder*, 342 F.2d 345 (9th Cir. 1965).

When the highest court of a state has declined to invoke an independent state ground and has proceeded to the merits of a federal question, it would be incongruous for a federal court to assert the state ground to shut off its review of the federal question. There appears to be no reason for a federal court to refuse to vindicate a federal claim by a more exacting insistence on state procedural requirements than the state court itself demanded. The so-called independent ground, not having been relied on by the state, is simply irrelevant.

B. With respect to Hayden's failure to prosecute an appeal from his conviction and the withdrawal of his ap-

relief in federal habeas corpus proceedings need not, as the text will indicate, be determined in this case. For an affirmative answer to the question, as well as a penetrating analysis of *Henry v. Mississippi* and *Fay v. Noia*, see Hill, "The Inadequate State Ground," 65 Colum. L. Rev. 943, 997 (1965). But cf. *Henderson v. Heinze*, 349 F.2d 67 (9th Cir. 1965); *Nelson v. People of State of California*, 346 F.2d 73 (9th Cir. 1965).

plication for leave to appeal from the state post-conviction decision, the District Court determined that no such deliberate bypass occurred as would prevent Hayden from raising in the federal court the constitutional issue of illegal search and seizure. We uphold the District Court's determination. Hayden's letter to the clerk of the Court of Appeals of Maryland requesting withdrawal of his application for leave to appeal displays complete ignorance of both the judicial process and the consequences of not pursuing his [fol. 35] judicial remedies in an orderly fashion.⁴ Under these circumstances we cannot find error in the District Court's determination of no deliberate bypass. See *Fay v. Noia*, 372 U.S. 391 (1963); *Pruitt v. Peyton*, 338 F.2d 859, 860-61 (4th Cir. 1964); *Hunt v. Warden, Maryland Penitentiary*, 335 F.2d 936, 944 (4th Cir. 1964).

III

Turning to the merits of Hayden's petition, we do not disagree with the District Court's determination that the arrest was lawful and the search conducted as an incident thereof constitutionally permissible.

⁴ Hayden's letter reads:

"Dear Mr. Young:

"I have an application for leave to appeal under the post conviction procedure act which is docketed at No. 18 Sept. term 1964. Since the opinion by Judge Sodaro is based on assertions contrary to the trial testimony which is in the trial transcript.

"After considering the opinion and the transcript I feel that this appeal is worthless since the statements in the opinion are far from being true, this being so I feel it is the wiser course to refile again in the lower State Court and since I can not have two actions pending at the same time I must withdraw my application for leave to appeal.

"I am sorry I waited so late to make up my mind but I am no lawyer and it took me quite some time to make the wiser decision.

"Your Very Truly

/s/ Bennie Joe Hayden"

A. Appellant does not strenuously contest the legality of his arrest. He concedes that the officers had probable cause to believe that a felony had been committed and that the felon was hiding in the house. There was testimony that the officers knocked on the door and announced the [fol. 36] purpose of their entry. The District Court so found the facts and concluded that regardless of the asserted lack of consent on the part of Mrs. Hayden to the entrance of the police, the officers were within their legal powers in entering in "hot pursuit" of a suspected felon.⁵

Although the appellant concedes the right of the police to conduct a search as an incident to the lawful arrest, he maintains that in its extent the search exceeded constitutionally permissible limits. The testimony showed that when the officers, approximately five in number, entered they knew only that a man suspected of robbery had run into the house. Not finding the suspect on the first floor, one officer proceeded to the basement while others went to the second floor, where they found Hayden. Learning that he was the only male in the house, the police arrested him, and conducted a search.⁶ The arrest and search lasted one hour. In its extent the search did not exceed the broad limits tolerated in *Harris v. United States*, 331 U.S. 145 (1947), where the Supreme Court affirmed the validity of an intensive five-hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest.

B. This brings us to the principal substantive issue presented by this appeal. The petitioner contends that even if the search itself were legal, the articles of clothing seized by the police were "of evidential value only" and that under [fol. 37] the principle repeatedly declared by the Supreme

⁵ The trial judge in the state post-conviction proceeding found that Mrs. Hayden had consented to the entry of the police.

⁶ It is unclear whether the clothing taken from the washing machine in the basement was procured before or after the arrest. In the view we take of the case it is unnecessary to resolve this ambiguity in the testimony.

Court, items having evidential value only are not subject to seizure and must be excluded at trial. *Gouled v. United States*, 255 U.S. 298, 310 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 464-66 (1932). See also *Abel v. United States*, 362 U.S. 217, 234-35 (1960); *Harris v. United States*, 331 U.S. 145, 154 (1947). The petitioner maintains therefore that under *Mapp v. Ohio*, 367 U.S. 643 (1961), the admission of the articles of clothing at his state trial violated his constitutional rights.

It cannot be doubted that the proscription against seizure of articles of only evidential value is one of constitutional dimensions. *E.g.*, *Gouled v. United States*, 255 U.S. 298, 310 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 464-67 (1932).⁷ In *Harris v. United States*, 331 U.S. 145, 154 (1947), Chief Justice Vinson, relying on the above cited cases, and others, said:

"This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instruments [fol. 38] talities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

The dissenting opinions of Justices Frankfurter, pp. 155, 165-66, and Murphy, pp. 183, 187-88, 191, specifically recog-

⁷ The state contends that the proscription against the seizure of articles of only evidential value is merely an exercise of the supervisory power of the federal courts and does not rise to constitutional proportions. While it is true that Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. § 41(b), may be interpreted to preclude such seizures, the Supreme Court has not relied on mere supervisory rules to support its decisions on this point, but has instead specifically grounded its decisions on the Fourth Amendment.

nized the distinction made by the majority between items subject to seizure and items which may not lawfully be seized. Thus, in the case dealing with the most extensive search ever validated by the Supreme Court, we find the Justices in the majority and those in dissent unanimous in condemning seizures by the police and the later use by the prosecution of articles having evidentiary value only.

The clothing in this case in no way constitutes the "means by which the crime was committed," unlike the things lawfully taken in *Abel v. United States*, 362 U.S. 217, 237-38 (1960) (forged birth certificate and graph paper with coded message used to conduct espionage activities); *Zap v. United States*, 328 U.S. 624, 629 & n.7 (1946) (cancelled check used to defraud the Government); *Marron v. United States*, 275 U.S. 192, 198-99 (1927) (business ledger and various bills used to operate an illegal business); *Gottone v. United States*, 345 F.2d 165, 166 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965) (lists of names and addresses with unexplained notations, race track results, and odds sheets used to operate illegal gambling business); *United States v. Boyette*, 299 F.2d 92, 94-95 (4th Cir.), *cert. denied*, 369 U.S. 844 (1962) (guest checks used in the operation of a brothel). There is no contention that the articles seized here were used by the felon as a disguise.

[fol. 39] Nor did the possession of the clothing constitute a "continuing crime." Examples of types of articles the possession of which constitutes a continuing crime can be found in *United States v. Rabinowitz*, 339 U.S. 56, 64 (1950) (forged and altered United States postage stamps), and *Harris v. United States*, 331 U.S. 145, 154-55 (1947) (false selective service cards). No discussion is required to demonstrate that the clothing was neither contraband nor the fruit of the crime.

No Supreme Court case has discussed the seizure of clothing. Cf. *Kremen v. United States*, 353 U.S. 346 (1957) (indiscriminate seizure of the entire contents of a cabin illegal). Lower federal courts, however, have had occasion

to consider the subject. See *Morrison v. United States*, 262 F.2d 449, 450-51 (D.C. Cir. 1958) (handkerchief containing tangible evidence of morals offense of "evidential value only" and therefore held not subject to seizure); *United States v. Lerner*, 100 F. Supp. 765, 768 (N.D. Calif. 1951) (identification bracelet, and documents, "merely evidentiary materials tending to connect the defendant with the crime for which he was arrested"—harboring or concealing a fugitive—and therefore held constitutionally not seizable); *United States v. Richmond*, 57 F. Supp. 903, 907 (S.D. W.Va. 1944) (articles of wearing apparel useful in the identification of the defendant held not subject to seizure). But cf. *United States v. Guido*, 251 F.2d 1, 3 (7th Cir.), cert denied, 356 U.S. 950 (1958) (shoes worn by bank robber held seizable as "the means" of committing the offense); *Trotter v. Stephens*, 241 F. Supp. 33, 40-41 (E.D. Ark. 1965) (articles of clothing in the possession of accused rapists seizable, although court does not advert to rule prohibiting seizure of articles of only evidential value).

[fol. 40] In the case before us the articles of clothing were introduced at trial either to aid witnesses in their identification of the defendant or to create an adverse inference by arguing consciousness of guilt from the unusual condition of the clothes in the washing machine and particularly the presence of the belt in the trousers. However compellingly suspicious the circumstances, it cannot be denied that the value of the garment was "evidential only."

The *Richmond* case, above cited, 57 F. Supp. 903, bears a remarkable resemblance to the one under consideration. There, a federal agent observed a man working at an illicit still. The following day the agent went to the defendant's home for the purpose of arresting him if it should turn out that he was the person seen at the still. The agent made the arrest, and as an incident to this lawful arrest seized several articles of defendant's clothing which were later used in evidence for the purpose of demonstrating that other clothing found at the still matched that admittedly

belonging to the defendant. The court concluded that even while the search itself was reasonable, the clothing it produced was of evidential value only and hence constitutionally immune from seizure.

The state stresses the fact that before entering Hayden's house, the police officers had been given a brief description of what the suspect was wearing, and that the articles of clothing seized provided a strong link in the prosecution's case against Hayden. But the potency of the evidence to convict was not accepted in *Gould* as justification for its admission. 255 U.S. at 310. In that case neither the officers' foreknowledge of the existence of the article seized, nor the prior issuance by a judicial officer of a search warrant [fol. 41] describing the item served to validate the taking of "evidential" material. 255 U.S. at 307.

We recognize that the search conducted by the officers was lawful; but the law imposes limitations on the types of articles which agents of Government may seize either in the execution of a search warrant or in connection with a lawful arrest. A succinct explanation of the underlying constitutional principle was provided by Judge Learned Hand:

"[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, *limitations upon the fruit to be gathered tend to limit the quest itself* * * *"
United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930)
 (Emphasis added.)^{*}

^{*} This passage was cited with approval in *United States v. Rabinowitz*, 339 U.S. 56, 64 n.6 (1950). See also Comment, "Limitations on Seizure of 'Evidentiary' Objects—A Rule in Search of

From time to time the line has wavered in the adjudication of the lawfulness of searches, but in no instance has the Supreme Court faltered in its adherence to the distinction so clearly enunciated by Judge Hand between what may and what may not be seized in a lawful search.⁹

Nor do we perceive any rational distinction between private papers that are of only evidential value and articles of clothing of the same character. The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, *papers*, and *effects* against unreasonable searches and seizures, shall not be violated." (Emphasis added.) Papers of only evidential value are not the sole items immune from seizure.¹⁰

Reason," 20 U. Chi. L. Rev. 319, 327 (1953), which Professor McCormick has praised as "acute" and "extensive." *McCormick on Evidence*, § 139 n.1(b), p. 294. *But cf.* Comment, "Eavesdropping Orders and the Fourth Amendment," 66 Colum. L. Rev. 355, 367 (1966).

⁹ See *Gouled v. United States*, 255 U.S. 298, 310 (1921); *Marron v. United States*, 275 U.S. 192, 198-99 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 464-66 (1932); *Davis v. United States*, 328 U.S. 582, 587-89 (1946); *Zap v. United States*, 328 U.S. 624, 629 (1946); *Harris v. United States*, 331 U.S. 145, 154 (1947); *Trupiano v. United States*, 334 U.S. 699, 704 (1948); *United States v. Rabinowitz*, 339 U.S. 56, 64 (1950); *Abel v. United States*, 362 U.S. 217, 234-35 (1960); Shellow, "The Continuing Vitality of the *Gouled* Rule: The Search for and Seizure of Evidence," 48 Marq. L. Rev. 172, 175 (1964).

¹⁰ The state argues that the exclusionary rule made applicable to the states by *Mapp v. Ohio*, 367 U.S. 643 (1961), should be applied only to items seized pursuant to an *unlawful* search, and not to things illegally seized in the course of a search which is itself not unlawful. We find no basis in reason or authority for such a distinction. In state as well as federal jurisdictions, the proscription against seizure of articles having only evidential value is a proscription grounded on the Fourth Amendment. The Supreme Court has made it abundantly clear that the due process clause of the Fourteenth Amendment requires that all evidence seized in violation of the Fourth Amendment shall be excluded at state trials. See *Beck v. Ohio*, 379 U.S. 89 (1964); *Aguilar v. Texas*, 378 U.S. 108 (1964); Comment, "Search and Seizures of 'Mere

We are mindful that eminent judges and scholars have challenged the correctness and wisdom of the rule that precludes the seizure and admission in evidence of articles having evidential value only, even if the search which produced [fol. 43] them was itself reasonable and lawful. Chief Justice Traynor has sharply criticized the rule as "an unfortunate * * * legal absurdity" and has argued further that it is not of such fundamental importance as to be applicable to the states through the Fourth and Fourteenth Amendments. *People v. Thayer*, 408 P.2d 108, 109 (Sup. Ct. Cal. 1965).¹¹ Chief Justice Weintraub, while expressing doubt that the states have leeway to adopt a rule for search at variance with the federal rule fashioned by the Supreme Court, reasoned that shoes with distinctive heels worn by the defendant while committing an armed robbery were an instrumentality of the crime and could be searched for and seized under a warrant specifically describing them. *State v. Bisaccia*, 213 A.2d 185 (Sup. Ct. N.J. 1965). Directly confronting the mere evidence rule, Chief Justice Weintraub argues cogently that "things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable * * *." 213 A. 2d at 193. Even so staunch an exponent of "individual liberties" as Professor Kamisar has criticized the rule as "unsound and undesirable." Kamisar, "Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,'" 53 J. Crim. L., C. & P. S. 171, 177 (1962). See also Comment, "Eavesdropping Orders and the Fourth Amendment," 66 Colum. L. Rev. 355, 370 (1966). *But cf.*

Evidence'—Amendment to Or.Rev. Stat. Sec. 141.010—Effect on Prior Law and Constitutionality." 43 Ore. L. Rev. 333, 346-49 (1964). *Cf. Ker v. California*, 374 U.S. 23, 34 (1963).

¹¹ Chief Justice Traynor, though expressing doubt as to the wisdom of the rule, held that the medical records under consideration were actually instruments of the crime—fraud in billing for welfare services—thus characterizing the disputed records as within a traditionally recognized category subject to seizure. As already pointed out, it cannot be maintained that this characterization could apply to the clothing in our case.

Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593 (1966).

[fol. 44] Judges, aware of the practical problems faced by police officers and prosecutors in the performance of their duties, have sometimes strained mightily to overcome the exclusionary effect of the mere evidence rule by stretching to the point of distortion the category of "instrumentalities of crime," in order to achieve the admission in evidence of articles manifestly of evidential value only. For example, in *United States v. Guido*, 251 F.2d 1 (7th Cir.), cert. denied, 356 U.S. 950 (1958), it was broadly declared that shoes could be an instrumentality of crime, for a robber could hardly facilitate escape if he was "fleeing barefooted from the scene of the hold-up." 251 F.2d at 4. While the result in a particular case may not be unreasonable, it can hardly be squared with the pronouncements of the Supreme Court. See Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593, 610 n.106 (1966).

While we recognize that the rationale of the rule immunizing from seizure articles of only evidentiary value has been the subject of vigorous debate, we do not feel at liberty to abandon a doctrine so firmly established in the Supreme Court decisions.¹² It may be thought timely to expose the doctrine to re-examination and reinterpretation, with a view to formulating sufficiently flexible guidelines without endangering constitutional protections. However, unless the Court sees fit to depart from its oft reiterated position, the judges of subordinate courts are obligated to adhere to it.

[fol. 45] For the reasons outlined, the order of the District Court must be reversed and the case remanded with directions to grant the writ of habeas corpus and discharge the petitioner unless the state will retry him within a reasonable time.

Reversed and remanded.

¹² The impropriety of seizing and putting in evidence items of only evidential value traces back to *Boyd v. United States*, 116 U.S. 616 (1886),

ALBERT V. BRYAN, Circuit Judge, dissenting:

Because the District Judge's conclusions are for me irrefutable, I cannot join in overturning his decision, notwithstanding the trenchancy of the majority opinion. I find altogether untenable, in the circumstances here, its determinative basis: that the truck driver's jacket and trousers worn by the petitioner Hayden when he committed the robbery were unlawfully *seized* because they were "of evidential value only", and so not admissible at his trial.

The evidential rifle of search and seizure has been sustained in other situations but it is inapposite in the setting of this case. The preliminary facts, unquestioned now, were stated by the District Judge as follows:

"On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition (sic) for both weapons. About 8 a.m. on March 17, armed with the pistol and [fol. 46] perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some \$363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them *followed him several blocks to his home at 2111 Koko Lane, which one of the drivers saw him enter.* The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house which Hayden had entered; the officers knocked at the

door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to speak to her husband and search the house. She offered no objection. . . ." (Accent added).

As the validity of the officers' entry and search of the house are uncontested and uncontestable, the pivot of the present decision is the *seizure* of the clothing. Hayden ran home to escape "hot" pursuit by persons who had been at the scene of the robbery and saw him go in the house. They were dutifully and lawfully attempting to apprehend him. While the police were not initially in the chase, they joined while it was still in full cry. Had they collared Hayden before he crossed his threshold, or afterwards but before he [fol. 47] undressed, the clothes he wore could unquestionably have been introduced in evidence as identification or for other purposes. *Robinson v. United States*, 283 F.2d 508 (D.C. Cir. 1960). How these articles were instantaneously immunized by his disrobement is unclear to me.

These garments were clues to the whereabouts of the robber. The officers did not know Hayden but they knew his attire. In fresh pursuit, they knew that the robber had sought asylum in the house; they did not know the refuge was his home. As the fugitive was not in sight on their entry, they were obliged to undertake a manhunt throughout the house. The seizure of the clothing occurred in the *hue and hunt* for the felon, as well as for the money, the pistol and the shotgun.

Obviously he was using his home as a hideout. Not until *after* the search of the cellar or basement for the felon, when the clothing was found; *was or could* Hayden be accused. Not until then were the police assured that no other man was in the house. On this point, the District Judge found:

"Hayden was feigning sleep in the back room on the *second* floor. Two or three officers roused and ques-

tioned him, and *when the officers who were searching the first floor and the cellar reported that no other man was in the house, they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of [fol. 48] Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the officer who was searching the cellar for a man or the money found a jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place, in a washing machine.* (Accent added.)

While this finding conclusively demonstrates that the arrest was not made until *after* the seizure of the clothes, the relative times of the two incidents are not critical. The important fact is that the seizure was made in tracking the felon and not in collecting evidence, the basis of the precept the majority would enforce. No authority is cited holding that an article seized *in a hunt* for a criminal is inadmissible because it is "of evidential value only". Nor is the item rendered untouchable because found in a quest in the quarry's home.

Again, Hayden's discard and concealment of the habit in which he had been observed on the street were as indicative of guilt as was his flight. The secreting of himself in the house anywhere—in basement, attic, bedroom, closet or on the roof—would be provable as incriminating conduct. Had he donned a different garb or disguised himself to avoid capture, the dissemblance would certainly be open to proof at trial. The proof would include production of the clothes he hid as well as those in which he reappeared.

Deceptions frequently speak as forcefully as words, and surely whatever a fugitive said to mislead the officer is fair evidence against him. Simply because the conduct or words

occur in the accused's home does not bar their admission. [fol. 49] Devices and designs to thwart arrest, or conviction have never, to my knowledge, been excluded as evidence against the schemer.

Finally, and most important, the clothing was seizable as something used in the commission of the crime, concededly a recognized exception to the rule against seizure of evidence only. Pretending to be asleep, Hayden when finally discovered was undressed and abed. Assuredly, his purpose was to show that he was not equipped to commit a crime at the cab terminal only a few minutes before and several city blocks away. He thus made the issue of whether the apparel in which he had been seen was an aid—a means or an instrument—in his criminal act.

Examples of personal effects converted into implements of crime would be eyeglasses worn by an accused when he committed a crime, but not found on apprehension and without which he later demonstrates he cannot see; or artificial limbs worn at the time, but later hidden and without which he cannot walk or handle a weapon. This was virtually the reasoning in *United States v. Guido*, 251 F2d 1, 3 (7 Cir. 1958), cert. den. 356 US 950, treating shoes as an instrument of the crime.

This is in no sense to declare clothes qua clothes to be tools of crime. Here, to repeat, they were put in this category by the accused's reliance on his near-nudeness to eliminate himself as the robbery suspect. They are not merely proof of identification. They establish his preparedness to perpetrate the offense; they belie his alibi.

[fol. 50] If nakedness can be thus employed to raise a reasonable doubt of guilt, surely it can be refuted by the clothes he wore when he robbed and ran. If not, then to impede identification a criminal need only strip immediately he is inside his front door. Indeed, under the ruling of the Court, he need not bother to hide his clothes. Left plainly visible, they still would not be touchable for they would be of "evidential value only."

I cannot agree to Hayden's release or re-trial simply because his clothes were admitted in evidence.

[fol. 51] HAYNSWORTH, Chief Judge:

I join my brothers in an order denying a petition for rehearing en banc, but I take advantage of the occasion for a word of explanation.

The question in this case has been the subject of extended debate within the court. Judge Bell and I were not members of the panel that originally heard it, but we have participated actively in the discussion. As a result, it is apparent that a majority of the court is of the view that we are bound to apply the "mere evidence" rule because of the broad language employed by the Supreme Court in those opinions holding that private papers which could not have been classed as instruments of the crime are not subject to seizure.

Nevertheless, I think that the language the Supreme Court has employed must be read in the light of what it has held. Neither in what it has held nor in what it has said can I find an inexorable command that we hold inadmissible these articles reasonably seized in the course of a reasonable search.

[fol. 52] The Fourth Amendment prohibits only those seizures that are unreasonable, as it prohibits only those searches that are unreasonable. It is one thing to say that a seizure of a diary containing incriminating entries is unreasonable as is a search having as its objective the discovery and the seizure of such a document. Each is prohibited by the Fourth and Fourteenth Amendments. It is quite another thing to say, however, that tangible articles discovered in the course of a reasonable search have the sanctity of private papers if they cannot be readily classified as instruments or fruits of the crime. An accused's cap on his head or his shoe on his foot has no such sanctity, and, in my view, such articles acquire none when removed

from his person and placed in his closet. If the shoe is useful in comparison with the footprint which the culprit left when he fled the scene of the crime, or if a cap is useful in resolving the uncertainties of visual identification, neither should have an immunity from seizure when discovered in the course of a reasonable and lawful search.

With the amendment's proscription of unreasonable searches and unreasonable seizures in mind, I can find nothing in what the Supreme Court has done and said which requires the rejection from evidence of these articles of clothing reasonably seized in the course of a search, which, concededly, was reasonable and lawful. We are not instructed to apply the underlying rule of reasonableness in an unreasonable manner.

As the standards for the admission of confessions are undergoing a continuing process of stiffening, the police are admonished to place greater dependence upon their resources for scientific investigation. Make an impression [fol. 53] of the footprint discovered at the scene, they are told, and be prepared to make extensive laboratory analyses of the dried blood on the shirt. Such investigatory procedures will be of little use, however, unless investigators are afforded a reasonable opportunity to obtain possession of the shoe for comparison with the impression and of the bloody shirt for laboratory analysis.

I find nothing unreasonable in the majority's preference that the Supreme Court deal with the matter, but, until it does so explicitly, I think subordinate courts are free to declare seizures of articles such as these to be reasonable and not unconstitutional. Merely because of difficulty in stretching the term "instruments of the crime" to encompass them, I do not think they are immune from reasonable seizure in the course of a lawful search. The fact that articles are incriminatory has never in itself been an objection to their seizure.

A majority of the court, however, is of the view that we may not consider the question unsettled. Since, informally,

the entire court has thoroughly canvassed our freedom to follow our own notions, it is most unlikely that a rehearing en banc would serve any useful purpose whatever. It is for that reason that I join in the order denying the petition.

[fol. 55]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 10,061.

BENNIE JOE HAYDEN, Appellant,

vs.

WARDEN, MARYLAND PENITENTIARY, Appellee.

Appeal from the United States District Court for the
..... District of Maryland.

JUDGMENT—April 21, 1966

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court, appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

Simon E. Sobeloff, United States Circuit Judge.

[File endorsement omitted]

[fol. 64]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,061

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 3, 1966

The court, having fully considered appellee's petition for rehearing en banc, hereby denies the same.

Clement F. Haynsworth, Jr., Chief Judge, Fourth Circuit;

Simon E. Sobeloff, United States Circuit Judge;

Herbert S. Boreman, United States Circuit Judge;

Albert V. Bryan, United States Circuit Judge;

J. Spencer Bell, United States Circuit Judge.

[File endorsement omitted]

[fol. 73] Clerk's Certificate (omitted in printing).

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 480—October Term, 1966

WARDEN, MARYLAND PENITENTIARY, Petitioner,

v.

BENNIE JOE HAYDEN.

ORDER ALLOWING CERTIORARI—November 7, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

AUG 25 1966

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

BENNIE JOE HAYDEN,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

BENNIE JOE HAYDEN,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The Warden of the Maryland Penitentiary, by Thomas B. Finan, Attorney General of Maryland, and Franklin Goldstein, Assistant Attorney General of Maryland; prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 21, 1966, and as to which a Petition for Rehearing En Banc was denied June 3, 1966.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions of the Circuit Court of Appeals, together with the additional dissenting opinion filed at the time of the Order denying a Rehearing En Banc, are printed in the Appendix hereto, *infra*, pages 1a to 19a, and are as yet unreported.

The opinion of the District Court for the District of Maryland, which was reversed by the majority opinion of the Circuit Court of Appeals, is unreported and is printed in the Appendix hereto, *infra*, pages 22a-29a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 21, 1966 (Apx. 20a). A Petition for Rehearing En Banc was timely filed, and on June 3, 1966, an Order was filed denying a Rehearing En Banc (Apx. 21a). A judgment in lieu of mandate was issued to the District Court for the District of Maryland on June 13, 1966, and upon a Motion to Recall the Mandate the judgment in lieu of mandate was recalled on July 13, 1966, pending this application for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Does the Fourth Amendment to the Constitution of the United States permit reasonable seizures of relevant evidential material, obtained in the course of a reasonable search, pursuant to a lawful arrest?
2. May experienced trial counsel, as part of trial tactics, waive the accused's right to object to the introduction of certain evidence?

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV to the Constitution of the United States:

"The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

By a two to one decision, the United States Court of Appeals for the Fourth Circuit reversed a decision of the District Court for the District of Maryland and held that the decisions of the Supreme Court interpreting the Fourth Amendment to the Constitution of the United States prohibit otherwise reasonable seizures of relevant evidential items (the clothing which was worn during the commission of a felony, which was observed by the witnesses and which was discarded to escape detection) obtained in the course of a reasonable search pursuant to a lawful arrest, merely because the items could not be classed as "weapons, means, fruits or contraband". The dissenting opinion holds that the seizure of the clothing was reasonable under the circumstances and therefore was not prohibited by the Fourth Amendment or the decisions of this Court. The dissenting judge further indicates that, under the facts of the instant case, the clothing could be considered as a means of committing the crime and the discarding of the clothing could be considered as a means of avoiding detection. In conjunction with the denial of a Petition for Rehearing En Banc, Chief Judge Haynsworth also found the seizure of the clothing to be reasonable and not prohibited by the Fourth Amendment or the decisions of this Court.

Both the Circuit Court of Appeals and the District Court found the relevant facts to be essentially undisputed, and the facts relevant to a decision by this Court on this Petition for a Writ of Certiorari are as follows:

An armed robbery, in which approximately \$363.00 was taken, occurred at 8 o'clock in the morning of March 17, 1962, on the premises of the Diamond Cab Company in Baltimore, Maryland. Two cabdrivers who were then within one-half block from the scene of the robbery independ-

ently followed the robber from the scene to a small row house at 2111 Cocoa Lane. One cabdriver had followed in his cab and was able to notify his dispatcher on the cab radio of the fact that he observed the robber run into 2111 Cocoa Lane. He gave the dispatcher a description of the robber as a negro, about 5 feet 8 inches tall, wearing a light cap and a dark jacket similar to a truck driver's uniform. The dispatcher immediately relayed all of this information to the police, who were then proceeding to the scene of the robbery and who then instead proceeded to 2111 Cocoa Lane.

The police arrived at 2111 Cocoa Lane within minutes of the time the robber had entered the house. The police knocked on the door; Mrs. Hayden answered the door; she was told by the police that a robber had entered and she admitted them without objection. The police looked briefly around the first floor of the small house and saw that there was no male hiding there. Therefore, one officer proceeded to the basement and two other officers proceeded upstairs. The officer who had gone to the basement called upstairs and said that there was no person hiding in the basement. The other two officers observed that Mr. Hayden, who was feigning sleep, was the only male in the house and therefore asked him to get out of bed; they thereupon arrested him.

At this time one officer heard a toilet running in the bathroom adjacent to the bedroom in which Mr. Hayden was found. The officer placed his hands in the flush tank and seized a sawed-off shotgun and a pistol. While searching Mr. Hayden's room for the weapons and the money, the police found ammunition for the guns and also found a sweater and a cap, similar to that described, under Mr. Hayden's mattress. The officer in the basement, in the course of his search to ascertain that no male was in the

basement, saw a washing machine. In the course of his search for either the man or the money, he looked into the washing machine and saw a jacket and a pair of pants to what looked like a truck driver's uniform with the belt still in the trousers. These items also fit the description of the clothing the suspected robber was wearing at the time the offense was committed. All of the above items were found by the police within one hour of the time of their entry into the house to arrest Mr. Hayden. Within one hour of the time of entry by the police, Mr. Hayden was taken from his home to police headquarters and the search was terminated. The money was not found and Mr. Hayden gave no statement to the police.

The seized items were admitted into evidence at Mr. Hayden's trial without any objection on the part of his privately-retained counsel, who was very experienced in the field of criminal law. At the trial Mr. Hayden's privately-retained counsel cross-examined the identification witnesses very carefully as to the precise color of the clothing which the robber was wearing and utilized the clothing in his cross-examination. Mr. Hayden's counsel also stressed the fact that, in spite of a very thorough search, no money had been found.

Mr. Hayden was convicted of robbery with a deadly weapon and sentenced to 14 years in the Maryland Penitentiary. He did not appeal his conviction but did file a petition for relief under the Maryland Post Conviction Act, which was denied without the taking of testimony. On application for leave to appeal from this action, the Maryland Court of Appeals remanded the case for an evidentiary hearing, which was held. After the hearing, the post conviction judge denied relief, holding that "the search of his home and seizure of the articles were proper". Once again Mr. Hayden filed an application for leave to appeal

to the Maryland Court of Appeals but, before the application could be acted upon, he requested to withdraw the application and his request was granted. Three months later Mr. Hayden filed the instant habeas corpus proceeding. After a full evidentiary hearing, the United States District Court for the District of Maryland (Thomsen, C.J.) found that the arrest was made in "hot pursuit" with the officers having probable cause to believe that a felony had been committed and that the felon was hiding in the house. Judge Thomsen found that the extent of the search under the circumstances was reasonable and was a much less extensive search than the search approved in *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947). Judge Thomsen denied the relief requested by Mr. Hayden.

Even the judges in the majority opinion in the Circuit Court of Appeals agreed with Judge Thomsen that the arrest was legal as being one made in "hot pursuit". They also agreed that the extent of the search was reasonable since the house was small, was under the complete control of Mr. Hayden, and the entire arrest and search lasted one hour. The Circuit Court of Appeals also found that the search was much less extensive than that approved in *Harris v. United States, supra*.

The entire Circuit Court of Appeals found that the seizure of the guns was proper, but the majority held that there is a constitutional prohibition arising out of the Fourth Amendment against the seizure of the cap, jacket and trousers which Mr. Hayden was wearing at the time he committed the felony and which he discarded immediately upon entering the house in order to avoid detection. The majority opinion recognizes that the seizure here was a reasonable one and further recognizes that the so-called

"mere evidence" rule, which was applied, has been severely criticized. Both the majority and dissenting opinions expressed doubt as to the reasonableness of the "mere evidence" rule itself. However, the majority opinion held that the court was bound by decisions of this Court to apply the "mere evidence" rule to state criminal proceedings.

REASONS FOR GRANTING THE WRIT

Both the majority and dissenting judges of the Circuit Court of Appeals and the attorneys representing the State and the petitioner in the Circuit Court of Appeals recognize the gravity of the majority decision and the effect it will have on prosecutions past, present and future within the states comprising the Fourth Circuit. All recognize that this is the first time that the "mere evidence" rule has been held applicable in a state criminal proceeding to the seizure of the clothing used in the commission of a felony where the clothing was seized during a reasonable search pursuant to a lawful arrest and would itself constitute relevant and material evidence that the crime had been committed and/or that the owner of the clothing was the perpetrator of the felony. Both the majority and the dissent in the Circuit Court of Appeals expressed the desire that this Court "expose the doctrine [the "mere evidence" rule] to re-examination and re-interpretation with a view to formulating sufficiently flexible guide lines without endangering constitutional protections" (Apx. 13a).

Your Petitioner believes that all of the most cogent reasons for granting a writ of certiorari exist in the instant case. Your Petitioner will discuss separately each of the following reasons for granting the writ.

1. There is a direct conflict between the majority opinion and decisions of this Court.

2. There is a direct conflict between the majority opinion and decisions in other United States Circuit Courts of Appeals and also in United States District Courts.

3. There is a direct conflict between the majority opinion and the decisions of the highest courts of many states.

4. The issue involved is an important one, has far-reaching effects, and the majority opinion would make it almost impossible for law enforcement officers to place greater dependence upon their resources for scientific investigation.

5. Both the majority and dissenting judges of the United States Court of Appeals for the Fourth Circuit recognize that the "mere evidence" rule as applied in this case is totally unreasonable and have asked that this Court grant the writ and re-examine this entire area in the light of modern developments.

Your Petitioner has set forth as a second question presented the issue of whether or not experienced trial counsel in the instant case waived the Respondent's right to object to the admission of the clothing into evidence. This issue will not be discussed further in this Petition for Writ of Certiorari since the Petitioner merely wishes to preserve it in the event that this Court sees fit to grant the writ of certiorari for any other reasons set forth herein. Petitioner believes that the fact that there was a deliberate waiver as part of trial tactics will be fully evident from the record in this case.

I.

Conflict With Decisions of This Court

In the case of *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726, 737-738 (1963), in that part of the opinion in which eight of the justices joined, this Court expressed the view that the Fourth Amendment is not "susceptible of Pro-

crustean application" when applied to the states. This Court said:

"This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of *Procrustean* application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. . . ."

* * * * *

"... The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. . . ." (Emphasis supplied.)

Even the majority opinion of the Circuit Court of Appeals recognizes that the "mere evidence" rule as applied to the instant case is unreasonable but states that prior decisions of this Court require all inferior Federal courts, like *Procrustes*, to tie the states and their reasonable search and seizure rules upon an iron bed and then either stretch or cut off their legs to adapt them to the length of the iron bed of Federal Rules of Criminal Procedure, Rule 41b, (18 U.S.C.A., Rule 41b). However, the *Ker* case, which postdates all the "mere evidence" opinions relied upon by the Circuit Court of Appeals, holds that the decisions of this Court do not intend to require inferior courts to impose unreasonable restraints on state rules as to searches and seizures.

Both the majority and the minority judges of the Circuit Court of Appeals recognize as reasonable the rule uniformly applied in all states which do not have a rule or

statute similar to Rule 41b, *supra*; see *State v. Coolidge*, 208 A. 2d 322, 333 (N.H., 1965). However, the majority judges believe that the decisions of this Court require them to be unreasonable in applying to the states an amendment to the Constitution of the United States which itself cries only for reasonableness. The *Ker* case stands squarely for the proposition that the Circuit Courts of Appeals do not have to invalidate state rules as to seizures which the Circuit Courts of Appeals find to be reasonable.

In addition, in recent cases with regard to the admission of confessions, such as *Miranda v. Arizona*, U.S., 16 L. Ed. 2d 694, this Court has placed great emphasis upon law enforcement officials placing greater dependence upon their resources for scientific investigation. As Chief Judge Haynsworth pointed out in his comments on the Petition for a Rehearing En Banc, such investigatory procedures will be of little use if the law enforcement officials are unable, even in a reasonable search pursuant to a lawful arrest, to obtain the articles of clothing worn while the felony was being committed for use in connection with their scientific investigation.

II.

Conflict With Decisions of Other United States Circuit Courts.

In the case of *United States v. Guido*, 251 F. 2d 1, 3 (7th Cir., 1958), *cert. den.* 356 U.S. 950, 2 L. Ed. 2d 843, the shoes worn at the time the crime was committed were held to be implements or means of committing the crime and therefore subject to seizure. The case of *United States v. Guido*, *supra*, was relied upon by the dissenting judge in his opinion. The majority opinion rejects the reasoning of *United States v. Guido*, *supra*, even though, as the dissent points out, the discarding of the clothing immediately upon

entering the house was a vital part of the robber's attempt to avoid detection.

The majority opinion here, also seems to be in conflict with another recent decision of the Fourth Circuit itself and two decisions of the United States Court of Appeals for the District of Columbia. In *Leek v. State of Maryland*, 353 F. 2d 526 (4th Cir., 1965), *Whalem v. United States*, 346 F. 2d 812 (D.C. Cir., 1965) cert. den. 382 U.S. 862, 15 L. Ed. 2d 100 (1965) and *Robinson v. United States*, 283 F. 2d 508 (D.C. Cir., 1960), cert. den. 364 U.S. 919, 5 L. Ed. 2d 259 (1960) it was held that law enforcement officials could seize and utilize, for laboratory investigation or as an aid to identification, clothing which the accused was wearing at the time of his arrest. As the dissenting opinion indicates it is difficult to see how the articles of clothing here, "were instantaneously immunized by his [Respondent's] disrobing . . ." (Apx. 15a),

In the case of *Trotter v. Stephens*, 241 F. Supp. 33, 40-41 (E.D. Ark., 1965) the articles of clothing in the possession of accused rapists, and not being worn by them, were held to be seizable, in direct conflict with the holding of the majority in the instant case. The *Trotter* case appears to hold that such clothing is seizable whether or not it is considered a means of committing a crime.

It is therefore apparent that federal courts in other circuits will have three possible points of conflict with the majority opinion in the instant case. Firstly, additional circuits may adopt the reasoning of *Guido*, that it would be difficult for an individual to go into the streets to perpetrate a crime while naked and, therefore, the clothing which he wears is a means of committing the crime. One does not have to utilize a mask to disguise one's self, and other circuits may adopt this reasoning to justify labelling

the clothing worn during the commission of a crime as a means of committing the crime and avoiding detection.

Secondly, all Circuits including the Fourth Circuit itself will continue to allow seizure of and use of clothing taken from the person of the accused.

Thirdly, it is probable that other circuits will adopt the apparent holding of *Trotter v. Stephens*, *supra*, and the actual holding of the highest courts of many states, which will be discussed *infra*, that items of evidential value may be seized whether or not labelled as a means of committing a crime.

III.

Conflict With Decisions of Highest Courts of the States.

The case of *People v. Thayer*, 408 P. 2d 108, 109 (Sup. Ct. Cal., 1965), *cert. den.* U.S. , 16 L. Ed. 2d 361 (1966), is the most recent opinion of the highest court of a state which is in total conflict with the majority opinion in the instant case. The majority opinion discusses the opinion of Chief Justice Traynor in *People v. Thayer*, *supra*:

"We are mindful that eminent judges and scholars have challenged the correctness and wisdom of the rule that precludes the seizure and admission in evidence of articles having evidential value only, even if the search which produced them was itself reasonable and lawful. Chief Justice Traynor has sharply criticized the rule as 'an unfortunate . . . legal absurdity' and has argued further that it is not of such fundamental importance as to be applicable to the states through the Fourth and Fourteenth Amendments. . . ." (Apx. 11a-12a).

The Court of Appeals of Maryland has consistently sustained the seizure of evidential items. *Davis v. State*, 236

Md. 389, 204 A. 2d 76 (1964), bloodstained shoes and clothing in a murder case; *Matthews v. State*, 228 Md. 401, 179 A. 2d 892 (1962), soiled sheets in a prosecution for keeping a disorderly house; *Shorey v. State*, 227 Md. 385, 177 A. 2d 245 (1962), bloodstained clothes and soiled trousers in a rape case; *Lucich v. State*, 194 Md. 511, 71 A. 2d 432 (1950); lottery slips in a prosecution for keeping a disorderly house.

In *State v. Bisaccia*, 213 A. 2d 185 (Sup. Ct. N.J., 1965), Chief Justice Weintraub, while expressing doubt that states have leeway to adopt a rule for search at variance with the federal rule allegedly fashioned by this Court, reasoned that shoes with distinctive heels worn by a defendant while committing an armed robbery were a means of committing the crime and could be seized. New Jersey has therefore adopted the reasoning of *Guido*, *supra*.

It has been pointed out in *State v. Coolidge*, *supra*, that in all states where there is no rule such as Rule 41b of the Federal Rules of Criminal Procedure the courts hold that there is no limitation on the seizure of evidential items in a reasonable search pursuant to a lawful arrest. Even in those states which have a rule similar to Rule 41b, the courts often adopt the reasoning of *United States v. Guido*, *supra*, and extend the normal concept as to what items are used as a means of committing a crime. In *State v. Chinn*, 231 Ore. 259, 373 P. 2d 392 (1962), a camera, soiled bed sheets and empty beer bottles were held to be means of committing statutory rape.

The unanimity among the highest courts of the states in either rejecting the "mere evidence" rule or finding some way to avoid it illustrates the intense conflict between the majority opinion and the practice throughout the states. It also illustrates what even the majority opinion in the

instant case recognizes — that the application of the “mere evidence” rule to the facts of the instant case is totally unreasonable.

IV.

Importance of the Issue Involved

The clothing which a person wears during the commission of a felony may often be the most relevant and least able to be contradicted evidence to connect the accused with the commission of the felony. It is also a most reasonable and logical item for the police to seize in the course of a reasonable search pursuant to a lawful arrest. In this case the clothing which was worn during the commission of the felony was quite distinctive and was described to the police by the witnesses. In many cases the clothing will contain other invaluable evidence that a crime has been committed, including semen stains in a rape case, blood stains in an assault or murder case, and paint scrapings in a burglary case. In all of these cases the clothing would be vital in order for the police to conduct a thorough scientific investigation, as has been suggested by this Court.

It has been previously indicated that in cases such as *Leek v. State of Maryland, supra*; *Whalem v. United States, supra*; and *Robinson v. United States, supra*, the police seizure of the clothing which an accused was wearing at the time of arrest was permissible. In *Leek*, the clothing was taken from the accused, sent to a laboratory and revealed spermatozoa on the accused's underwear, and in *Robinson v. United States, supra*, the clothing was taken, sent to a laboratory and revealed paint chips and other debris corresponding to materials found at the scene of a burglary. In *Whalem v. United States, supra*, the clothing

was taken and was used, ~~as~~ in the instant case, as an aid to identification of the accused. /

In view of the fact that the clothing worn during the commission of a felony is such an important item in proper investigation and in view of the fact that the majority opinion in the instant case may cause considerable confusion when it is compared with *United States v. Guido, supra*; *Leek v. State of Maryland, supra*; *Robinson v. United States, supra*; and *Whalem v. United States, supra*, it is vital to the law enforcement officials and to those persons accused of crime and attorneys who represent them that the confusion in this area be eliminated. This Court has denied petitions for writs of certiorari in *People v. Thayer, supra*; *Whalem v. United States, supra*; *Robinson v. United States, supra*; and *United States v. Guido, supra*, which only compounds the confusion as to when the law enforcement officials may seize the clothing and utilize it and when they may not do so. It is apparent that different results will prevail among the Circuits.

Confusion as to what the law is aids neither the law enforcement officials nor those accused of crime. All would be benefited if this Court were to review this important area and formulate proper guide lines with regard to the search and seizure of "evidential items" without endangering necessary constitutional protections.

V.

The Entire United States Court of Appeals for the Fourth Circuit Has Asked That This Court Grant Certiorari.

All of the judges of the United States Court of Appeals for the Fourth Circuit have recognized the importance of the issue involved here, as discussed in the previous reason

for granting the writ. They have all recognized the very tenuous distinction between what is a means or instrumentality of committing a crime and what is not. They have all recognized the fact that many courts stretch "to the point of distortion the category of 'instrumentalities of crime'" (Apx. 13a). The United States Court of Appeals for the Fourth Circuit also recognizes the apparent difference in result if the police arrive while the accused is disrobing rather than arriving a few minutes after he has disrobed.

We believe that the following hypothetical situation clearly illustrates the unreasonableness of the majority view in the instant case and the reason why both the majority and dissent believe that this Court should review the so-called "mere evidence" rule.

A rapes B at knife-point. B screams and the police arrive at the scene. A runs off and B points to A and says, "That man raped me at knife-point." The police follow A and A runs into a house. A takes off his pants and shirt and throws them and the knife under a chair near the front door. The police come in to arrest A and A is sitting in a chair reading a newspaper in his undershorts and undershirt. The police observe the clothing and the knife under the chair. They arrest A, take the knife and the pants and shirt. The pants are semen-stained and also contain blood-stains which laboratory analysis identifies as the same type as the blood of B. According to the majority of the Circuit Court of Appeals, the police could seize the knife but not the clothing. Also, according to the majority, if the police arrive after A had taken off his pants and thrown them under the chair but before he had taken off his shirt, they could seize the shirt which contains no stains and subject it to laboratory analysis, but they could not seize the pants and subject them to laboratory analysis.

There is absolutely no justification for saying that the Constitution or decisions of this Court interpreting the Fourth Amendment provide that there should be such a great distinction in what the police may lawfully seize between the situation where the police arrive a few seconds before a suspect has disrobed and the situation where the police arrive a few seconds after he has disrobed. The unreasonableness of the distinction is further illustrated by the fact that the very purpose for which the suspect disrobes is to avoid detection.

Where the arrest is legal and the search is reasonable, there is absolutely no reason for providing that the police may not seize the clothing worn during the commission of a felony. This is especially true where it is apparently uniformly recognized that the very same clothing is seizable and admissible into evidence if it happens that the accused is wearing it at the time he is arrested.

CONCLUSION

For the reasons set forth above, it is apparent that a decision by this Court to grant the writ of certiorari and to review this case would enable this Court to resolve direct conflicts between the majority opinion and decisions of this Court, decisions of the other United States Circuit Courts of Appeals, and decisions of the highest courts of many states. It would also enable this Court to reconsider an area of constitutional law that has not been fully considered by this Court in recent years. It is an area of vital importance to all law enforcement officials and to all those accused of crime. It is also an area in which there is much confusion as to what the law is and what it should be.

Therefore, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINIONS BELOW

OPINIONS OF THE CIRCUIT COURT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN,

Appellant,

versus

WARDEN, MARYLAND PENITENTIARY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND, AT BALTIMORE.
(ROSZEL C. THOMSEN, District Judge)

(Argued October 8, 1965. Decided April 21, 1966.)

(Petition for rehearing en banc denied June 3, 1966.)

Before SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

Albert, R. Turnbull (Court-assigned counsel) [Fine, Fine, Legum, Schwan & Fine on brief] for Appellant, and Franklin Goldstein, Assistant Attorney General of Maryland, (Thomas B. Finan, Attorney General of Maryland, on brief) for Appellee.

SOBELOFF, Circuit Judge:

Appellant Hayden is serving a sentence of fourteen years in the Maryland Penitentiary, having been convicted and sentenced in the Criminal Court of Baltimore City in June,

1962, for robbery with a deadly weapon. After a hearing in the District Court on his application for a writ of habeas corpus, relief was denied, and from this action an appeal was taken.

In this court the petitioner's basic contention is that certain evidence admitted at trial was the product of an unconstitutional search and seizure. The state maintains that the search and the seizure were lawful, and urges further that, even if unlawful, petitioner has waived his right to raise the issue in the federal courts because of his failure to object at trial, failure to appeal from the conviction, and withdrawal of his appeal from the state court's denial of post-conviction relief.

I

An armed robbery occurred at eight o'clock on the morning of March 17, 1962, on the premises of the Diamond Cab Company in Baltimore. Two cab drivers saw a man running from the scene and heard shouts of "hold up, stop that man." The cab drivers, proceeding independently, followed the suspected robber to 2111 Cocoa Lane. One of the drivers actually saw him enter the house. The police were immediately notified and in a few minutes arrived at that address. They had been told that the offender was a Negro about 5'8", 25 years old, and wore a light cap and dark jacket.

The police knocked at the door and Hayden's wife answered. The officers told her that they had information that a holdup man was in the house. There is some dispute as to whether or not Mrs. Hayden objected to the entry of the officers. However this may be, several officers entered and went to all three floors, and when no man other than Hayden was found in the house, they arrested him. They seized a sawed-off shotgun and a pistol which they found in the flush tank of the toilet, some ammunition, a sweater, and a dark gray cap, found under Hayden's mattress, shotgun shells lying in a bureau drawer, and a man's jacket and trousers with a belt, discovered in a washing machine in the basement. The police, however, found no stolen money.

The seized items were admitted in evidence without objection by the defendant's retained counsel. The clothing was used to fix the identity of Hayden as the man seen running from the scene of the crime and into 2111 Cocoa Lane.

Hayden failed to appeal his conviction, but upon his confinement in the Maryland Penitentiary he promptly petitioned the state court for relief under the Maryland Post-Conviction Procedure Act. Relief was denied without the taking of testimony. On appeal from this action the Maryland Court of Appeals remanded the case for an evidentiary hearing with respect to the challenged lawfulness of the search and seizure. After testimony, the post-conviction judge again denied relief, holding "that the search of his home and seizure of the articles in question were proper."

Thereupon, Hayden applied for leave to appeal to the Court of Appeals of Maryland. Before his application was acted upon, however, he requested its withdrawal. The request was granted.¹ He filed the instant habeas corpus petition three months later. His right to appeal to the Court of Appeals of Maryland is now barred by time.

II

A. We deal first with the failure of trial counsel to make a contemporaneous objection to the admission of the seized articles. The state contends that the failure to object at trial constitutes a waiver by Hayden of his right to assert the constitutional claim in a federal habeas corpus proceeding. In order to preclude consideration of the constitutional claim on federal habeas corpus the state must show that Hayden, acting through his attorney, voluntarily relinquished a known right by failing to object at trial² and that

¹ In the meantime, during the pendency of his application for state post-conviction relief, Hayden had filed two habeas corpus petitions in the federal District Court, both of which had been denied for failure to exhaust available state remedies.

² The state in its brief speculates that the failure to object was a tactical maneuver on the part of Hayden's trial counsel. The state attributes to him a deliberate purpose to allow the admission of the clothing, so that he might create a reasonable doubt in the minds of the jurors by arguing to them that the police officers conducted a more

the failure to object constitutes an independent and adequate state ground. See *Henry v. Mississippi*, 379 U.S. 443, 452 (1965), relying on *Fay v. Noia*, 372 U.S. 391, 438-39 (1963).³ See also *Dillon v. Peters*, 341 F.2d 337, 339 (10th Cir. 1965).

It is unnecessary in this case to reach the question of whether Hayden voluntarily relinquished his constitutional claim, for in the state post-conviction proceedings the Court of Appeals of Maryland did not look upon the failure to ob-

than usually thorough search and yet were unable to find any stolen money. Hayden's trial counsel, however, testified in the District Court habeas hearing that he did not object because he was under the impression that the arrest and the search were lawful and thought the articles could not be excluded. Aside from the fact that there is a total absence of testimony to support the state's hypothesis, the tactical maneuver postulated by the state is wholly unrealistic, for the lawyer could have laid a foundation for the same argument to the jury by cross-examination of the police officers. The argument would have been readily available without subjecting the defendant to the damage obviously resulting from the admission of the clothing.

³ In *Henry*, a case coming to the Supreme Court on direct appeal from a state conviction, it was said:

"* * * a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. *Fay v. Noia*, *supra*, at 438." 379 U.S. at 452.

And at page 447 of the *Henry* opinion the Court observed:

"[It is settled] that a litigant's defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

Whether the Supreme Court has in fact abolished the "independent and adequate state procedural ground" as a basis for denying relief in federal habeas corpus proceedings need not, as the text will indicate, be determined in this case. For an affirmative answer to the question, as well as a penetrating analysis of *Henry v. Mississippi* and *Fay v. Noia*, see Hill, "The Inadequate State Ground," 65 Colum. L. Rev. 943, 997 (1965). But cf. *Henderson v. Heinze*, 349 F.2d 67 (9th Cir. 1965); *Nelson v. People of State of California*, 346 F.2d 73 (9th Cir. 1965).

ject as a bar to his constitutional claim. Instead it remanded the case to the lower court for a determination of the legality of the search and seizure. *Hayden v. Warden, Maryland Penitentiary*, 233 Md. 613, 195 A.2d 692 (1963). Since the Court of Appeals of Maryland did not interpose the failure to object as a bar to consideration of the merits of the constitutional issue, denial of state post-conviction relief cannot be said to rest on an independent state ground. The District Court was therefore not precluded from considering the constitutional question on its merits. Cf. *Henderson v. Heinze*, 349 F.2d 67 (9th Cir. 1965); *Nelson v. People of State of California*, 346 F.2d 73 (9th Cir. 1965); *Rhay v. Browder*, 342 F.2d 345 (9th Cir. 1965).

When the highest court of a state has declined to invoke an independent state ground and has proceeded to the merits of a federal question, it would be incongruous for a federal court to assert the state ground to shut off its review of the federal question. There appears to be no reason for a federal court to refuse to vindicate a federal claim by a more exacting insistence on state procedural requirements than the state court itself demanded. The so-called independent ground, not having been relied on by the state, is simply irrelevant.

B. With respect to Hayden's failure to prosecute an appeal from his conviction and the withdrawal of his application for leave to appeal from the state post-conviction decision, the District Court determined that no such deliberate bypass occurred as would prevent Hayden from raising in the federal court the constitutional issue of illegal search and seizure. We uphold the District Court's determination. Hayden's letter to the clerk of the Court of Appeals of Maryland requesting withdrawal of his application for leave to appeal displays complete ignorance of both the judicial process and the consequences of not pursuing his judicial remedies in an orderly fashion.⁴ Under these

⁴ Hayden's letter reads:

"Dear Mr. Young:

"I have an application for leave to appeal under the post conviction procedure act which is docketed at No. 18 Sept. term 1964. Since the

circumstances we cannot find error in the District Court's determination of no deliberate bypass. See *Fay v. Noia*, 372 U.S. 391 (1963); *Pruitt v. Peyton*, 338 F.2d 859, 860-61 (4th Cir. 1964); *Hunt v. Warden, Maryland Penitentiary*, 335 F.2d 936, 944 (4th Cir. 1964).

III

Turning to the merits of Hayden's petition, we do not disagree with the District Court's determination that the arrest was lawful and the search conducted as an incident thereof constitutionally permissible:

A. Appellant does not strenuously contest the legality of his arrest. He concedes that the officers had probable cause to believe that a felony had been committed and that the felon was hiding in the house. There was testimony that the officers knocked on the door and announced the purpose of their entry. The District Court so found the facts and concluded that regardless of the asserted lack of consent on the part of Mrs. Hayden to the entrance of the police, the officers were within their legal powers in entering in "hot pursuit" of a suspected felon.⁵

Although the appellant concedes the right of the police to conduct a search as an incident to the lawful arrest, he maintains that in its extent the search exceeded constitutionally permissible limits. The testimony showed that when the officers, approximately five in number, entered they knew only that a man suspected of robbery had run into the house. Not finding the suspect on the first floor,

opinion by Judge Sodaro is based on assertions contrary to the trial testimony which is in the trial transcript.

"After considering the opinion and the transcript I feel that this appeal is worthless since the statements in the opinion are far from being true, this being so I feel it is the wiser course to refile again in the lower State Court and since I can not have two actions pending at the same time I must withdraw my application for leave to appeal.

"I am sorry I waited so late to make up my mind but I am no lawyer and it took me quite some time to make the wiser decision.

"Yours Very Truly

/s/ BENNIE JOE HAYDEN"

⁵ The trial judge in the state post-conviction proceeding found that Mrs. Hayden had consented to the entry of the police.

one officer proceeded to the basement while others went to the second floor, where they found Hayden. Learning that he was the only male in the house, the police arrested him, and conducted a search.⁶ The arrest and search lasted one hour. In its extent the search did not exceed the broad limits tolerated in *Harris v. United States*, 331 U.S. 145 (1947), where the Supreme Court affirmed the validity of an intensive five-hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest.

B. This brings us to the principal substantive issue presented by this appeal. The petitioner contends that even if the search itself were legal, the articles of clothing seized by the police were "of evidential value only" and that under the principle repeatedly declared by the Supreme Court, items having evidential value only are not subject to seizure and must be excluded at trial. *Gouled v. United States*, 255 U.S. 298, 310 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 464-66 (1932). See also *Abel v. United States*, 362 U.S. 217, 234-35 (1960); *Harris v. United States*, 331 U.S. 145, 154 (1947). The petitioner maintains therefore that under *Mapp v. Ohio*, 367 U.S. 643 (1961), the admission of the articles of clothing at his state trial violated his constitutional rights.

It cannot be doubted that the proscription against seizure of articles of only evidential value is one of constitutional dimensions. *E.g.*, *Gouled v. United States*, 255 U.S. 298, 310 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 464-67 (1932).⁷ In *Harris v. United States*, 331 U.S. 145, 154 (1947),

⁶ It is unclear whether the clothing taken from the washing machine in the basement was procured before or after the arrest. In the view we take of the case it is unnecessary to resolve this ambiguity in the testimony.

⁷ The state contends that the proscription against the seizure of articles of only evidential value is merely an exercise of the supervisory power of the federal courts and does not rise to constitutional proportions. While it is true that Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. § 41(b), may be interpreted to preclude such seizures, the Supreme Court has not relied on mere supervisory rules to support its decisions on this point, but has instead specifically grounded its decisions on the Fourth Amendment.

Chief Justice Vinson, relying on the above cited cases, and others, said:

"This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

The dissenting opinions of Justices Frankfurter, pp. 155, 165-66, and Murphy, pp. 183, 187-88, 191, specifically recognized the distinction made by the majority between items subject to seizure and items which may not lawfully be seized. Thus, in the case dealing with the most extensive search ever validated by the Supreme Court, we find the Justices in the majority and those in dissent unanimous in condemning seizures by the police and the later use by the prosecution of articles having evidentiary value only.

The clothing in this case in no way constitutes the "means by which the crime was committed," unlike the things lawfully taken in *Abel v. United States*, 362 U.S. 217, 237-38 (1960) (forged birth certificate and graph paper with coded message used to conduct espionage activities); *Zap v. United States*, 328 U.S. 624, 629 & n.7 (1946) (cancelled check used to defraud the Government); *Marron v. United States*, 275 U.S. 192, 198-99 (1927) (business ledger and various bills used to operate an illegal business); *Gottone v. United States*, 345 F.2d 165, 166 (10th Cir.), cert. denied, 382 U.S. 901 (1965) (lists of names and addresses with unexplained notations, race track results, and odds sheets used to operate illegal gambling business); *United States v. Boyette*, 299 F.2d 92, 94-95 (4th Cir.), cert. denied, 369 U.S. 844 (1962) (guest checks used in the operation of a brothel). There is no contention that the articles seized here were used by the felon as a disguise.

Nor did the possession of the clothing constitute a "continuing crime." Examples of types of articles the possession of which constitutes a continuing crime can be found in *United States v. Rabinowitz*, 339 U.S. 56, 64 (1950) (forged and altered United States postage stamps), and *Harris v. United States*, 331 U.S. 145, 154-55 (1947) (false selective service cards). No discussion is required to demonstrate that the clothing was neither contraband nor the fruit of the crime.

No Supreme Court case has discussed the seizure of clothing. Cf. *Kremen v. United States*, 353 U.S. 346 (1957) (indiscriminate seizure of the entire contents of a cabin illegal). Lower federal courts, however, have had occasion to consider the subject. See *Morrison v. United States*, 262 F.2d 449, 450-51 (D.C. Cir. 1958) (handkerchief containing tangible evidence of morals offense of "evidential value only" and therefore held not subject to seizure); *United States v. Lerner*, 100 F. Supp. 765, 768 (N.D. Calif. 1951) (identification bracelet, and documents, "merely evidentiary materials tending to connect the defendant with the crime for which he was arrested" — harboring or concealing a fugitive — and therefore held constitutionally not seizable); *United States v. Richmond*, 57 F. Supp. 903, 907 (S.D. W. Va. 1944) (articles of wearing apparel useful in the identification of the defendant held not subject to seizure). But cf. *United States v. Guido*, 251 F.2d 1, 3 (7th Cir.), cert. denied, 356 U.S. 950 (1958) (shoes worn by bank robber held seizable as "the means" of committing the offense); *Trotter v. Stephens*, 241 F. Supp. 33, 40-41 (E.D. Ark. 1965) (articles of clothing in the possession of accused rapists seizable, although court does not advert to rule prohibiting seizure of articles of only evidential value).

In the case before us the articles of clothing were introduced at trial either to aid witnesses in their identification of the defendant or to create an adverse inference by arguing consciousness of guilt from the unusual condition of the clothes in the washing machine and particularly the presence of the belt in the trousers. However compellingly suspicious the circumstances, it cannot be denied that the value of the garment was "evidential only."

The *Richmond* case, above cited, 57 F. Supp. 903, bears a remarkable resemblance to the one under consideration. There, a federal agent observed a man working at an illicit still. The following day the agent went to the defendant's home for the purpose of arresting him if it should turn out that he was the person seen at the still. The agent made the arrest, and as an incident to this lawful arrest seized several articles of defendant's clothing which were later used in evidence for the purpose of demonstrating that other clothing found at the still matched that admittedly belonging to the defendant. The court concluded that even while the search itself was reasonable, the clothing it produced was of evidential value only and hence constitutionally immune from seizure.

The state stresses the fact that before entering Hayden's house, the police officers had been given a brief description of what the suspect was wearing, and that the article of clothing seized provided a strong link in the prosecution's case against Hayden. But the potency of the evidence to convict was not accepted in *Gouled* as justification for its admission, 255 U.S. at 310. In that case neither the officers' foreknowledge of the existence of the article seized, nor the prior issuance by a judicial officer of a search warrant describing the item served to validate the taking of "evidential" material. 255 U.S. at 307.

We recognize that the search conducted by the officers was lawful; but the law imposes limitations on the types of articles which agents of Government may seize either in the execution of a search warrant or in connection with a lawful arrest. A succinct explanation of the underlying constitutional principle was provided by Judge Learned Hand:

"[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in pro-

tecting what does. Nevertheless, *limitations upon the fruit to be gathered tend to limit the quest itself * * *.*" *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930) (Emphasis added.)⁸

From time to time the line has wavered in the adjudication of the lawfulness of searches, but in no instance has the Supreme Court faltered in its adherence to the distinction so clearly enunciated by Judge Hand between what may and what may not be seized in a lawful search."

Nor do we perceive any rational distinction between private papers that are of only evidential value and articles of clothing of the same character. The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." (Emphasis added.) Papers of only evidential value are not the sole items immune from seizure.¹⁰

We are mindful that eminent judges and scholars have challenged the correctness and wisdom of the rule that pre-

⁸ This passage was cited with approval in *United States v. Rabino-witz*, 339 U.S. 56, 64 n.6 (1950). See also Comment, "Limitations on Seizure of 'Evidentiary' Objects — A Rule in Search of Reason," 20 U. Chi. L. Rev. 319, 327 (1953), which Professor McCormick has praised as "acute" and "extensive." *McCormick on Evidence*, § 139 n.1(b), p. 294. But cf. Comments, "Eavesdropping Orders and the Fourth Amendment," 66 Colum. L. Rev. 355, 367 (1966).

⁹ See *Gouled v. United States*, 255 U.S. 298, 310 (1921); *Marron v. United States*, 275 U.S. 192, 198-99 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 464-66 (1932); *Davis v. United States*, 328 U.S. 582, 587-89 (1946); *Zap v. United States*, 328 U.S. 624, 629 (1946); *Harris v. United States*, 331 U.S. 145, 154 (1947); *Trupiano v. United States*, 334 U.S. 699, 704 (1948); *United States v. Rabino-witz*, 339 U.S. 56, 64 (1950); *Abel v. United States*, 362 U.S. 217, 234-35 (1960); Shellow, "The Continuing Vitality of the *Gouled* Rule: The Search for and Seizure of Evidence," 48 Marq. L. Rev. 172, 175 (1964).

¹⁰ The state argues that the exclusionary rule made applicable to the states by *Mapp v. Ohio*, 367 U.S. 643 (1961), should be applied only to items seized pursuant to an *unlawful* search, and not to things illegally seized in the course of a search which is itself not unlawful. We find no basis in reason or authority for such a distinction. In state as well as federal jurisdictions, the proscription against seizure of

cludes the seizure and admission in evidence of articles having evidential value only, even if the search which produced them was itself reasonable and lawful. Chief Justice Traynor has sharply criticized the rule as "an unfortunate * * * legal absurdity" and has argued further that it is not of such fundamental importance as to be applicable to the states through the Fourth and Fourteenth Amendments. *People v. Thayer*, 408 P.2d 108, 109 (Sup. Ct. Cal. 1965).¹¹ Chief Justice Weintraub, while expressing doubt that the states have leeway to adopt a rule for search at variance with the federal rule fashioned by the Supreme Court, reasoned that shoes with distinctive heels worn by the defendant while committing an armed robbery were an instrumentality of the crime and could be searched for and seized under a warrant specifically describing them. *State v. Bisaccia*, 213 A.2d 185 (Sup. Ct. N.J. 1965). Directly confronting the mere evidence rule, Chief Justice Weintraub argues cogently that "things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable * * *." 213 A.2d at 193. Even so staunch an exponent of "individual liberties" as Professor Kamisar has criticized the rule as "unsound and undesirable." Kamisar, "Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,'" 53 J. Crim. L., C. & P. S. 171, 177 (1962). See also Comments, "Eavesdropping Orders

articles having only evidential value is a proscription grounded on the Fourth Amendment. The Supreme Court has made it abundantly clear that the due process clause of the Fourteenth Amendment requires that all evidence seized in violation of the Fourth Amendment shall be excluded at state trials. See *Beck v. Ohio*, 379 U.S. 89 (1964); *Aguilar v. Texas*, 378 U.S. 108 (1964); Comment, "Search and Seizures of 'Mere Evidence' — Amendment to Or. Rev. Stat. Sec. 141.010 — Effect on Prior Law and Constitutionality," 43 Ore. L. Rev. 333, 346-49 (1964). Cf. *Ker v. California*, 374 U.S. 23, 34 (1963).

¹¹ Chief Justice Traynor, though expressing doubt as to the wisdom of the rule, held that the medical records under consideration were actually instruments of the crime — fraud in billing for welfare services — thus characterizing the disputed records as within a traditionally recognized category subject to seizure. As already pointed out, it cannot be maintained that this characterization could apply to the clothing in our case.

and the Fourth Amendment," 66 Colum. L. Rev. 355, 370 (1966). But cf. Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593 (1966).

Judges, aware of the practical problems faced by police officers and prosecutors in the performance of their duties, have sometimes strained mightily to overcome the exclusionary effect of the mere evidence rule by stretching to the point of distortion the category of "instrumentalities of crime," in order to achieve the admission in evidence of articles manifestly of evidential value only. For example, in *United States v. Guido*, 251 F.2d 1 (7th Cir.), cert. denied, 356 U.S. 950 (1958), it was broadly declared that shoes could be an instrumentality of crime, for a robber could hardly facilitate escape if he was "fleeing barefooted from the scene of the hold-up." 251 F.2d at 4. While the result in a particular case may not be unreasonable, it can hardly be squared with the pronouncements of the Supreme Court. See Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593, 610 n.106 (1966).

While we recognize that the rationale of the rule immunizing from seizure articles of only evidentiary value has been the subject of vigorous debate, we do not feel at liberty to abandon a doctrine so firmly established in the Supreme Court decisions.¹² It may be thought timely to expose the doctrine to re-examination and reinterpretation, with a view to formulating sufficiently flexible guidelines without endangering constitutional protections. However, unless the Court sees fit to depart from its oft reiterated position, the judges of subordinate courts are obligated to adhere to it.

For the reasons outlined, the order of the District Court must be reversed and the case remanded with directions to grant the writ of habeas corpus and discharge the petitioner unless the state will retry him within a reasonable time.

Reversed and remanded.

¹² The impropriety of seizing and putting in evidence items of only evidential value traces back to *Boyd v. United States*, 116 U.S. 616 (1886).

ALBERT V. BRYAN, Circuit Judge, dissenting:

Because the District Judge's conclusions are for me irrefutable, I cannot join in overturning his decision, notwithstanding the trenchancy of the majority opinion. I find altogether untenable, in the circumstances here, its determinative basis: that the truck driver's jacket and trousers worn by the petitioner Hayden when he committed the robbery were unlawfully seized because they were "of evidential value only", and so not admissible at his trial.

The evidential rule of search and seizure has been sustained in other situations but it is inapposite in the setting of this case. The preliminary facts, unquestioned now, were stated by the District Judge as follows:

"On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition (sic) for both weapons. About 8 a.m. on March 17, armed with the pistol and perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some \$363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them followed him several blocks to his home at 2111 Koko Lane, which one of the drivers saw him enter. The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house which Hayden had entered; the officers knocked at the door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to

... speak to her husband and search the house. She offered no objection. . . ." (Accent added.)

As the validity of the officers' entry and search of the house are uncontested and uncontestable, the pivot of the present decision is the seizure of the clothing. Hayden ran home to escape "hot" pursuit by persons who had been at the scene of the robbery and saw him go in the house. They were dutifully and lawfully attempting to apprehend him. While the police were not initially in the chase, they joined while it was still in full cry. Had they collared Hayden before he crossed his threshold, or afterwards but before he undressed, the clothes he wore could unquestionably have been introduced in evidence as identification or for other purposes. *Robinson v. United States*, 283 F.2d 508 (D.C. Cir. 1960). How these articles were instantaneously immunized by his disrobement is unclear to me.

These garments were clues to the whereabouts of the robber. The officers did not know Hayden but they knew his attire. In fresh pursuit, they knew that the robber had sought asylum in the house; they did not know the refuge was his home. As the fugitive was not in sight on their entry, they were obliged to undertake a manhunt throughout the house. The seizure of the clothing occurred in the *hue and hunt* for the felon, as well as for the money, the pistol and the shotgun.

Obviously he was using his home as a hideout. Not until *after* the search of the cellar or basement for the felon, when the clothing was found, *was or could* Hayden be accused. Not until then were the police assured that no other man was in the house. On this point, the District Judge found:

"Hayden was feigning sleep in the back room on the second floor. Two or three officers roused and questioned him, and *when the officers who were searching the first floor and the cellar reported that no other man was in the house*, they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and

found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the officer who was searching the cellar for a man or the money found a *jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place, in a washing machine.* (Accent added.)

While this finding conclusively demonstrates that the arrest was not made until *after* the seizure of the clothes, the relative times of the two incidents are not critical. The important fact is that the seizure was made in tracking the felon and not in collecting evidence, the basis of the precept the majority would enforce. No authority is cited holding that an article seized *in a hunt* for a criminal is inadmissible because it is "of evidential value only". Nor is the item rendered untouchable because found in a quest in the quarry's home.

Again, Hayden's discard and concealment of the habit in which he had been observed on the street were as indicative of guilt as was his flight. The secreting of himself in the house anywhere — in basement, attic, bedroom, closet or on the roof — would be provable as incriminating conduct. Had he donned a different garb or disguised himself to avoid capture, the dissemblance would certainly be open to proof at trial. The proof would include production of the clothes he hid as well as those in which he reappeared.

Deceptions frequently speak as forcefully as words, and surely whatever a fugitive said to mislead the officer is fair evidence against him. Simply because the conduct or words occur in the accused's home does not bar their admission. Devices and designs to thwart arrest or conviction have never, to my knowledge, been excluded as evidence against the schemer.

Finally, and most important, the clothing was seizable as something used in the commission of the crime, concededly a recognized exception to the rule against seizure of evi-

dence only. Pretending to be asleep, Hayden when finally discovered was undressed and abed. Assuredly, his purpose was to show that he was not equipped to commit a crime at the cab terminal only a few minutes before and several city blocks away. He thus made the issue of whether the apparel in which he had been seen was an aid — a means or an instrument — in his criminal act.

Examples of personal effects converted into implements of crime would be eyeglasses worn by an accused when he committed a crime, but not found on apprehension and without which he later demonstrates he cannot see; or artificial limbs worn at the time, but later hidden and without which he cannot walk or handle a weapon. This was virtually the reasoning in *United States v. Guido*, 251 F.2d 1, 3 (7 Cir. 1958), cert. denied, 356 U.S. 950, treating shoes as an instrument of the crime.

This is in no sense to declare clothes qua clothes to be tools of crime. Here, to repeat, they were put in this category by the accused's reliance on his near-nudeness to eliminate himself as the robbery suspect. They are not merely proof of identification. They establish his preparedness to perpetrate the offense; they belie his alibi.

If nakedness can be thus employed to raise a reasonable doubt of guilt, surely it can be refuted by the clothes he wore when he robbed and ran. If not, then to impede identification a criminal need only strip immediately he is inside his front door. Indeed, under the ruling of the Court, he need not bother to hide his clothes. Left plainly visible, they still would not be touchable for they would be of "evidential value only."

I cannot agree to Hayden's release or re-trial simply because his clothes were admitted in evidence.

ON PETITION FOR A REHEARING EN BANC

HAYNSWORTH, Chief Judge:

I join my brothers in an order denying a petition for rehearing en banc, but I take advantage of the occasion for a word of explanation.

The question in this case has been the subject of extended debate within the court. Judge Bell and I were not members of the panel that originally heard it, but we have participated actively in the discussion. As a result, it is apparent that a majority of the court is of the view that we are bound to apply the "mere evidence" rule because of the broad language employed by the Supreme Court in those opinions holding that private papers which could not have been classed as instruments of the crime are not subject to seizure.

Nevertheless, I think that the language the Supreme Court has employed must be read in the light of what it has held. Neither in what it has held nor in what it has said can I find an inexorable command that we hold inadmissible these articles reasonably seized in the course of a reasonable search.

The Fourth Amendment prohibits only those seizures that are unreasonable, as it prohibits only those searches that are unreasonable. It is one thing to say that a seizure of a diary containing incriminating entries is unreasonable as is a search having as its objective the discovery and the seizure of such a document. Each is prohibited by the Fourth and Fourteenth Amendments. It is quite another thing to say, however, that tangible articles discovered in the course of a reasonable search have the sanctity of private papers if they cannot be readily classified as instruments or fruits of the crime. An accused's cap on his head or his shoe on his foot has no such sanctity, and, in my view, such articles acquire none when removed from his person and placed in his closet. If the shoe is useful in comparison with the footprint which the culprit left when he fled the scene of the crime, or if a cap is useful in

resolving the uncertainties of visual identification, neither should have an immunity from seizure when discovered in the course of a reasonable and lawful search.

With the amendment's proscription of unreasonable searches and unreasonable seizures in mind, I can find nothing in what the Supreme Court has done and said which requires the rejection from evidence of these articles of clothing reasonably seized in the course of a search, which, concededly, was reasonable and lawful. We are not instructed to apply the underlying rule of reasonableness in an unreasonable manner.

As the standards for the admission of confessions are undergoing a continuing process of stiffening, the police are admonished to place greater dependence upon their resources for scientific investigation. Make an impression of the footprint discovered at the scene, they are told, and be prepared to make extensive laboratory analyses of the dried blood on the shirt. Such investigatory procedures will be of little use, however, unless investigators are afforded a reasonable opportunity to obtain possession of the shoe for comparison with the impression and of the bloody shirt for laboratory analysis.

I find nothing unreasonable in the majority's preference that the Supreme Court deal with the matter, but, until it does so explicitly, I think subordinate courts are free to declare seizures of articles such as these to be reasonable and not unconstitutional. Merely because of difficulty in stretching the term "instruments of the crime" to encompass them, I do not think they are immune from reasonable seizure in the course of a lawful search. The fact that articles are incriminatory has never in itself been an objection to their seizure.

A majority of the court, however, is of the view that we may not consider the question unsettled. Since, informally, the entire court has thoroughly canvassed our freedom to follow our own notions, it is most unlikely that a rehearing en banc would serve any useful purpose whatever. It is for that reason that I join in the order denying the petition.

JUDGMENT

(Filed and entered April 21, 1966)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN,

Appellant.

v.

WARDEN, MARYLAND PENITENTIARY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,

United States Circuit Judge.

21a

ORDER

(Filed and entered June 3, 1966)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN,

Appellant,

v.

WARDEN, MARYLAND PENITENTIARY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND,
AT BALTIMORE.

The court, having fully considered appellee's petition
for rehearing en banc, hereby denies the same.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

SIMON E. SOBELOFF,
United States Circuit Judge.

HERBERT S. BOREMAN,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

A true copy,

Teste:

MAURICE S. DEAN,
Clerk, U.S. Court of Appeals
for the Fourth Circuit.

By MARGARET M. WALTON,
Deputy Clerk.

OPINION OF THE DISTRICT COURT

(Filed March 3, 1965)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL No. 14388

BENNIE JOE HAYDEN

v.

WARDEN, MARYLAND PENITENTIARY

Alva P. Weaver, III, court-appointed, for petitioner.

Thomas B. Finan, Attorney General of Maryland, and
Franklin Goldstein, Assistant Attorney General, for
respondent.

THOMSEN, Chief Judge:

Petitioner (Hayden) is serving a sentence of fourteen years in the Maryland Penitentiary following his conviction by Judge Manley in the Criminal Court of Baltimore of robbery with a deadly weapon. In his present petition for a writ of habeas corpus and at the hearing thereon he pressed five contentions: (1) that his arrest was illegal; (2) that a search of his house and the seizure of guns, ammunition and clothing made at the time of his arrest was illegal; (3) that his representation at his trial in the Criminal Court was inadequate, because no objection was made to the introduction into evidence of the material so seized; (4) that the prosecuting witness failed to identify him; and (5) that the indictment was based on hearsay.

In view of various proceedings in the State Courts and the failure of Hayden to enter or to press certain appeals

or applications to appeal to the Court of Appeals of Maryland, there is serious doubt as to what questions Hayden is entitled to raise here. Nevertheless, this Court has permitted Hayden and his counsel to offer in evidence whatever testimony and exhibits they wished to offer, including the transcripts of his trial in May 1962 and of the hearing before Judge Sodaro in March 1964. There is some conflict between the testimony of the witnesses given at the trial and their testimony in this Court, largely due to the lapse of time. As Hayden's wife recognized on the stand, she did not remember all the details after three years. Neither did the busy police officers. Hayden himself is not a trustworthy witness. From all the evidence, after weighing the credibility of the witnesses, this Court finds the following facts.

On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition for both weapons. About 8 a.m. on March 17, armed with the pistol and perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some \$363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them followed him several blocks to his home at 2111 Koko Lane, which one of the drivers saw him enter. The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house which Hayden had entered; the officers knocked at the door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to speak to her husband and search the house. She offered no objec-

tion. Based upon the testimony offered before him at the Post Conviction Procedure Act (PCPA) hearing, Judge Sodaro found that Mrs. Hayden "gave the policeman permission to enter the home". The fuller evidence before this Court is conflicting, but this Court need not decide whether to accept the State Court's finding of that historical fact, nor resolve the conflict in the testimony, because it is clear that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house; under the law discussed below, they were justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery.

Hayden was feigning sleep in the back room on the second floor. Two or three officers roused and questioned him, and when the officers who were searching the first floor and the cellar reported that no other man was in the house, they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the officer who was searching the cellar for a man or the money found a jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place, in a washing machine.

Hayden was arrested and taken to the police station, along with the items referred to above. He made no admissions to the police. He was represented by counsel at his preliminary hearing, and after his indictment engaged an attorney with wide experience in criminal cases to represent him at his trial.

The victim could not identify Hayden, but described the clothing worn by the robber, and testified that the weapon held by the robber had a barrel like the P .38. The two taxi drivers identified Hayden as the man they saw running from the scene of the robbery. Several police officers testified, and the guns, ammunition and clothing seized at

the time of the arrest were admitted in evidence without objection. The strategy of Hayden's trial counsel was to question the identification of Hayden and to attack the credibility of the important State witnesses by vigorous cross-examination with respect to the color of the clothes and other matters. He felt that there were reasonable grounds for the arrest and the search, and since the explanation which he had for the pistol included the shotgun, felt there was no point in objecting to the introduction into evidence of the gun and its ammunition. The introduction into evidence of the sweater helped rather than hurt Hayden; the State might have been criticized if it had failed to produce the sweater, which was found under the mattress and was not like the clothing described by the victim and other State witnesses. Judge Manley postponed the closing of the testimony so that the defendant might produce Miller. After argument on May 28, 1962, Judge Manley found Hayden guilty of robbery with a deadly weapon.¹ Sentence was postponed pending a possible motion for a new trial, but after Hayden had discussed the matter with his trial counsel he decided not to file such a motion. He was sentenced on June 8, 1962, to a term of fourteen years, accounting from March 17, 1962.

Contrary to the testimony of Hayden, this Court finds that his trial counsel advised him of his right of appeal, and told him how he might proceed in forma pauperis. Hayden, however, decided not to appeal, probably because the sentence might have been considerably longer, but parted with his counsel on the note that they would seek parole after three and a half years.

As soon as Hayden reached the penitentiary he received "legal" advice from his fellow inmates, and filed a petition under the PCPA in less than three weeks, on June 28, 1962. Before that petition could be heard he filed, on August 8, 1962, a motion to strike the conviction and sentence. The latter motion was heard first and was denied on November

¹ The reasons Judge Manley gave for his findings are set out in the transcript of the trial, pp. 152-154.

14, 1962. An appeal from that denial was dismissed on January 17, 1963.

On April 23, 1963, an experienced attorney was appointed to represent Hayden in his PCPA proceeding. In his amended petition for relief therein he asserted: (1) that his home was forcibly entered and searched; (2) that the prosecuting witness failed to positively identify him; (3) that the *nolle prosequi* by the State of a count in the indictment was proof of innocence; and (4) that he had been denied a speedy trial. At the post conviction hearing, he further asserted (5) that he was indicted on hearsay evidence and (6) that he was dissatisfied with the services of trial counsel for failure to object to hearsay evidence produced at the trial.

Judge Sodaro disposed of all of those contentions after a hearing at which no testimony was taken. Only two of his rulings are important here: (1) Judge Sodaro held that "questions of the legality of search and seizure relating to the admissibility of evidence obtained by an allegedly illegal search and seizure should have been raised at the trial, and are not grounds for relief under the Act"; and (6) after noting that Hayden had testified that he was not satisfied with the services of his attorney because the attorney had failed to object to hearsay evidence at the trial, Judge Sodaro stated: "This is a bald assertion unsupported by any specifics, and is also without merit. He does not claim that his attorney for any other reason was incompetent or failed to properly represent him."

Leave to appeal from Judge Sodaro's order was granted and the case was remanded for further proceedings. *Hayden v. Warden*, 233 Md. 613, 195 A.2d 692 (1963). The Court of Appeals said:

"For the reasons stated by Judge Sodaro in the lower court, we agree that the applicant was not entitled to post conviction relief for any of the reasons stated in the second through the sixth contentions, but this may not be true with respect to the first contention, concerning the search of his home and arrest without a

warrant which the applicant subsequently stated was his basic contention.

"* * * We think the question should first have been considered as one of fact rather than a question of law."

On remand, Judge Sodaro granted a hearing, at which petitioner, represented by experienced counsel, testified. His wife wrote that she had moved to Detroit and was unable to attend the hearing. Hayden did not suggest that any effort be made to take her deposition. She had testified at the trial, and Hayden was evidently satisfied with that testimony. Officer Parrish was the only officer who was called to testify by either side. On March 19, 1964, Judge Sodaro filed an order denying relief, in which he set forth specific findings of fact with respect to the arrest and the search and seizure, and as a result of his findings of fact, "concluded that the Petitioner's contention is without merit and that his arrest was legal and that the search of his home and the seizure of the articles in question were proper." ●

On March 24, 1964, Hayden filed an application for leave to appeal from Judge Sodaro's order. On April 25, however, Hayden sent a letter to the Clerk of the Court of Appeals of Maryland requesting the withdrawal of the application for leave to appeal. His request was granted on April 29. Hayden thereupon filed three petitions for writs of habeas corpus, one in the Circuit Court for Washington County and two in the Circuit Court for Prince George's County, all of which were denied.

Meanwhile, Hayden had filed two petitions for writs of habeas corpus in this Court, one of which was denied by me on February 4, 1963, and the other by Judge Winter on September 10, 1963, both because Hayden had not exhausted his State remedies.

His State remedies are now exhausted. It is a close question whether failure to appeal from his conviction and his withdrawal of his application for leave to appeal from Judge Sodaro's second order were deliberate by-passes of available State remedies within the meaning of *Fay v. Noia*,

372 U.S. 393 (1963); *Hunt v. Warden*, 4 Cir., 335 F.2d 936 (1964); and *Pruitt v. Peyton*, 4 Cir., 338 F.2d 859 (1964). Hayden is intelligent, familiar with legal terms and concepts, an avid reader of Supreme Court reports, and an untrustworthy witness. The Court of Appeals of Maryland has already ruled in his favor on one appeal. From the evidence, however, I do not find such a deliberate by-pass or waiver as would prevent his raising in this Court the issues of illegal arrest and illegal search and seizure.

(1) *Legality of Arrest*. This Court would be justified in accepting the findings of historical fact made by Judge Sodaro on that issue following the second hearing before him, which met all of the tests set out in *Townsend v. Sain*, 372 U.S. 293 (1963). However, as noted above, this Court need not decide whether to accept the State Court's finding that Mrs. Hayden "gave the policeman permission to enter the home" nor resolve the conflict in the testimony in this Court on that point, because this Court has found from the evidence that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house. They were therefore justified in entering the house after announcing their authority and purpose, whether or not permission was given. *Beck v. State of Ohio*, 376 U.S. 905 (1964); *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925); *Chappell v. United States*, D.C. Cir., F.2d (1965); *Miller v. United States*, 357 U.S. 301 (1958); *Davis v. State*, 236 Md. 389 (1964); *Mulcahy v. State*, 221 Md. 413 (1959); see *Ker v. California*, 374 U.S. 23, at 37 et seq.; *Ralph v. Pepersack*, 4 Cir., 335 F.2d 128 (1964).

(2) *Extent of the Search*. Under the evidence the officers were justified in searching the house not only for the man who had been seen entering the house, but also for any weapons he might have used and for the fruits of the crime, the money taken from the victim. The search was made incident to the arrest, and within a few minutes thereof. The clothing was found while one of the officers was in the base-

ment looking for a man and the money; the pistol and the shotgun were found in the bathroom whose door was three feet from Hayden's room, after an officer noticed that the toilet was running continuously. The search and seizures were not unreasonable. *Harris v. United States*, 331 U.S. 145 (1947); *Abel v. United States*, 362 U.S. 217 (1959); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Ker v. California*, 374 U.S. 23 (1963); *Rees v. Peyton*, 4 Cir., 332 F.2d 504 (1965); *Collins v. Klinger*, 9 Cir., 332 F.2d 504 (1964); *Leahy v. United States*, 9 Cir., 272 F.2d 47 (1960); *Davis v. State*, 236 Md. 389 (1964).

(3) *Adequacy of Representation.* Hayden was represented at his trial by counsel of his own choosing, widely experienced in criminal cases, who exercised his best judgment as to how the case should be tried. Hayden made no objection to his counsel or to the Court at the time, and may well be held to have waived any objections to matters of strategy and tactics. In any event, his representation by his trial counsel was not so inadequate as to amount to a denial of Hayden's constitutional rights. *Snead v. Smythe*, 4 Cir., 273 F.2d 838 (1959); *Brown v. Peppersack*, 4 Cir., 334 F.2d 9 (1964); cf. *Bowler v. Warden*, 4 Cir., 334 F.2d 202 (1964).

(4) *Failure of Prosecuting Witness to Identify Hayden.* In view of the other evidence there is no merit to this point.

(5) *Indictment Based on Hearsay.* If true, and there is no evidence to support the charge, this point would be without merit. *Costello v. United States*, 350 U.S. 359 (1956).

The relief prayed is hereby denied, and Hayden is hereby remanded to the custody of respondent.

(Signed) ROSZEL C. THOMSEN,

Chief Judge,

U.S. District Court.

FILED

FEB 16 1967

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

WARDEN OF THE MARYLAND PENITENTIARY,
Petitioner,

v.

BENNIE JOE HAYDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Fourth Circuit (R. 131-151) are reported at 363 F. 2d 647, sub nom. *Hayden v. Warden, Maryland Penitentiary*.

The Opinion of the United States District Court for the District of Maryland (R. 37-45) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 21, 1966 (R. 151). A Petition for Rehearing en banc was timely filed, and

on June 3, 1966, the United States Court of Appeals for the Fourth Circuit filed an Order denying Petition for Re-hearing (R. 152). A judgment in lieu of mandate was issued to the United States District Court for the District of Maryland on June 13, 1966, and upon a Motion to Recall the Mandate, the judgment in lieu of mandate was recalled on July 13, 1966 pending the filing of a Petition for a Writ of Certiorari. The Petition for Writ of Certiorari was filed on August 25, 1966, and was granted on November 7, 1966 (R. 153). The Court has jurisdiction under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the Constitution of the United States permits reasonable seizures of relevant evidential material, obtained in the course of a reasonable search pursuant to a lawful arrest.

2. Whether experienced trial counsel, as part of trial tactics, may waive the accused's right to object to the introduction into evidence of certain items seized.

STATUTES INVOLVED

Amendment IV to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 41(b) of the Federal Rules of Criminal Procedure, Article 27, Section 551 of the Annotated Code of Maryland and Rules 522 d 2 and 885 of the Maryland Rules of Procedure are set forth in Petitioner's Appendix, *infra*.

STATEMENT OF THE CASE

Bennie Joe Hayden was convicted of robbery with a deadly weapon by Judge Michael J. Manley, sitting without a jury, in the Criminal Court of Baltimore on May 28, 1962 (R. 37-38, 92, 126-127). He was sentenced on June 8, 1962 to a term of fourteen (14) years in the Maryland Penitentiary, accounting from March 17, 1962 (R. 41). He did not appeal his conviction but did file a Petition for Relief under the Maryland Post Conviction Procedure Act, which was denied without the taking of testimony on May 24, 1963 (R. 23-25, 41, 133). On Application for Leave to Appeal from this action, the Maryland Court of Appeals remanded the case for an evidentiary hearing. *Hayden v. Warden*, 233 Md. 613, 195 A. 2d 692 (1963).

On remand, a hearing was held at which Mr. Hayden was represented by experienced counsel and at which Mr. Hayden testified (R. 42). After the testimony the post conviction judge again denied relief, holding "that the search of his home and the seizure of the articles in question were proper" (R. 26-27, 42-43, 133).

Mr. Hayden again filed an Application for Leave to Appeal to the Court of Appeals of Maryland, but before the Application could be acted upon, he requested to withdraw the Application and his request was granted (R. 28, 36-37, 43, 133).¹ On July 22, 1964 Mr. Hayden filed the instant habeas corpus proceeding (R. 8-15).

After a full evidentiary hearing, the United States District Court for the District of Maryland (Thomsen, C. J.) found that the arrest was legal since "the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house." (R. 44). Judge Thomsen also found that the search and seizure were reasonable and that the search was less extensive than the search approved in *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947) (R. 44). Judge Thomsen refused the relief requested by Mr. Hayden (R. 37-45).

On Mr. Hayden's appeal to the United States Court of Appeals for the Fourth Circuit, the Order of the District Court was reversed in a two-to-one decision. Both the majority Opinion and the dissenting Opinion agreed that the arrest was lawful as being one made in "hot pursuit" and also agreed that the extent of the search was reasonable since the house was small, was under the complete control of Mr. Hayden, the entire arrest and search lasted one hour, and the extent of the search did not exceed the limits tolerated in *Harris v. United States*, *supra* (R. 137).

Both the majority Opinion and the dissenting Opinion recognized that the seizure of two guns found in the flush

¹ During the pendency of his Application for post conviction relief, Mr. Hayden had filed two habeas corpus petitions in the Federal District Court, both of which had been denied for failure to exhaust available State remedies. After Mr. Hayden's request to withdraw his Application for Leave to Appeal was granted, he filed three Petitions for Writs of Habeas Corpus, one in the Circuit Court for Washington County, and two in the Circuit Court for Prince George's County, all of which were denied (R. 43, 133).

tank of a toilet and their introduction into evidence was proper, but the majority Opinion held that even though the arrest was legal and the search was reasonable, the clothing which Mr. Hayden was wearing when he committed the felony and which he discarded immediately upon entering the house in order to avoid detection could not be seized because of decisions of this Court applying the Fourth Amendment to the Constitution of the United States. The dissenting Opinion pointed out the lack of logic in holding that the mere fact that a felon disrobes upon entering his house in order to avoid detection somehow immunizes the clothing from a reasonable search and seizure. The dissenting Opinion also stresses that the clothing was used by Mr. Hayden in committing the crime and may even have been used by him as a form of disguise. In conjunction with the denial of a rehearing en banc, Chief Judge Haynsworth of the United States Court of Appeals for the Fourth Circuit joined in the dissent and found that the search and seizure were reasonable and not prohibited by the Fourth Amendment to the Constitution of the United States, or by the decisions of this Court (R. 131-151). *Hayden v. Warden, Maryland Penitentiary*, 363 F. 2d 647 (1966).

The facts with regard to the arrest, search and seizure, and introduction of seized items into evidence which are pertinent in connection with this Court's review of the questions presented are as follows:²

An armed robbery in which approximately \$363.00 was taken occurred at eight o'clock in the morning on March 17, 1962, on the premises of the Diamond Cab Company in Baltimore, Maryland (R. 38, 92-93, 132). Two cab drivers,

² Both the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland found the relevant facts to be essentially undisputed.

who were then within half a block from the scene of the robbery, followed the robber from the scene to a small row house at 2111 Cocoa Lane (R. 38-39, 97-99, 102-103, 132). One cab driver had followed in his cab and was able to notify his dispatcher on the cab radio of the fact that he observed the robber run into 2111 Cocoa Lane (R. 39, 99). He gave the dispatcher a description of the robber as a Negro about 5' 8" tall, wearing a light cap and a dark jacket, similar to a truck driver's uniform. The dispatcher immediately relayed all of this information to the police who were then proceeding to the scene of the robbery and who thereafter proceeded instead to 2111 Cocoa Lane (R. 34, 39, 49, 132).

The police arrived at 2111 Cocoa Lane within minutes of the time the robber had entered the house (R. 39, 102, 132). The police knocked on the door; Mrs. Hayden answered the door; she was told by the police that they believed a robber had entered the house; and she admitted the police without objection (R. 3, 34-35, 39, 50-51, 63-64, 67, 106, 118-119, 132). The police looked briefly around the first floor of the small house and saw there was no male hiding there. Therefore, one officer proceeded to the basement and two other officers proceeded upstairs (R. 39, 52-53, 56, 132).

The two officers who had proceeded upstairs, observed that Mr. Hayden, who was feigning sleep, was the only male in the house and they, therefore, asked him to get out of bed and get dressed; they thereupon arrested him (R. 39, 71-73, 132).

At about this time, one officer heard a toilet running in the bathroom adjacent to the bedroom in which Mr. Hayden was found. The officer placed his hand in the flush tank and seized a sawed-off shotgun and a pistol (R. 39, 59-61, 132).

While searching Mr. Hayden's room for the weapons and the money, the police found ammunition for the guns and

also found a sweater and a cap, similar to that described, under Mr. Hayden's mattress (R. 39, 61, 106-114, 119-120, 132-133).

The officer in the basement, in the course of his search to ascertain that no male was in the basement, saw a washing machine. While searching for either the man or the money, he looked into the washing machine and saw a jacket and a pair of pants to what looked like a truck driver's uniform, with the leather belt still in the trousers. These items also fit the description of the clothing the suspected robber was wearing at the time the offense was committed (R. 40, 56-57, 133).

All of the above items were found by the police within one hour of the time of their entry into the house to arrest Mr. Hayden (R. 40, 73-74, 137). Within one hour of the time of entry by the police, Mr. Hayden was taken from his home to police headquarters, and the search was terminated. The money was not found and Mr. Hayden gave no statement to the police (R. 40, 44, 137).

The seized items were admitted into evidence at Mr. Hayden's trial without any objection on the part of his privately retained counsel, who was very experienced in the trial of criminal cases (R. 40, 45, 106-109, 133).

At the trial Mr. Hayden's counsel cross-examined the identification witnesses very carefully as to the precise color of the clothing which the robber was wearing, and utilized the clothing in his cross-examination (R. 40, 96, 113-114). Mr. Hayden's counsel also stressed the fact that in spite of a very thorough search, no money had been found (R. 111-113).³

³ Trial counsel was apparently successful in stressing this point since the trial judge commented that the only missing link in the whole case was the fact that the search did not produce the money which had been taken (R. 126-127).

The State filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The Petition for Writ of Certiorari was granted on November 7, 1966.

SUMMARY OF ARGUMENT

I.

The Fourth Amendment only prohibits unreasonable searches and seizures. A review of the reasons for the adoption of the Fourth Amendment and the Fifth Amendment, and a review of the *Gouled*¹ and *Lefkowitz* cases² and their antecedents, illustrates that there is no historical justification for holding that the seizure of the clothing, here, was in any way unreasonable, within the meaning of that term under the Fourth Amendment, or was in any way violative of the Fifth Amendment protection against self-incrimination. Both *Gouled* and *Lefkowitz* involved the exclusion of incriminating documentary evidence which could have been excluded because each search was exploratory and, therefore, unreasonable in itself. However, the majority Opinion below relied on *Gouled* and *Lefkowitz* as establishing a "Rule"³ which required the exclusion of non-documentary evidence — the clothing in the instant case. The "Rule" as applied by the majority Opinion requires an attempt to distinguish between relevant evidence which can be classed as means, fruits or contraband, and relevant evidence which cannot technically be so classed. There is no basis in history or logic for requiring such a distinction.

The entire court below recognized that this Court had never applied the "Rule" to non-documentary evidence.

¹ *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921).

² *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

³ See, Brief, page 14, for an explanation of use of "Rule".

Many courts at both the federal and state level, and many of the most informed writers in this area of the law, have questioned whether this Court ever intended the "Rule" to apply to non-documentary evidence. There is a distinction between private papers and non-documentary evidence, such as clothing, and, therefore, the "Rule" should not be extended to non-documentary evidence.

Even if the "Rule" is intended to and does apply to non-documentary evidence, such as the clothing in the instant case, the "Rule" is not applicable to the states under either the Fourth or Fifth Amendment. In *Ker v. California*,⁴ eight of the justices joined in stating that "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application . . .", and the states are not "precluded from developing workable rules governing arrests, searches and seizures. . . ." In *Gouled and Lefkowitz* this Court could have achieved the same result by relying on the federal search warrant statute then in effect which was not applicable to the states. The "Rule" itself is constantly condemned as being unreasonable and most of the states have attempted to avoid the "Rule" by decision and by statute. The *Gouled* case does not necessarily establish the "Rule" as being of constitutional dimensions and, therefore, in the light of *Ker*, the "Rule" should not be applied to the states.

*Schmerber v. California*⁵ removes any possible Fifth Amendment support for the "Rule", at least as applied to non-documentary evidence. *Schmerber* states that in requiring an individual to submit to the withdrawal and chemical analysis of his blood, the state has compelled him to submit to an attempt to discover evidence. That evidence does not fit the technical classification of means, fruits or contraband. Yet *Schmerber* holds that the with-

⁴ 374 U.S. 23, 33-34, 10 L. Ed. 2d 726, 737-738 (1963).

⁵ 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

drawal and chemical analysis does not violate the privilege against self-incrimination. Such privilege only applies to evidence of a testimonial or communicative nature. Like the blood in *Schmerber*, the clothing here is not evidence of a testimonial or communicative nature. Therefore, seizure of the clothing does not violate the privilege against self-incrimination.

Schmerber also removes Fourth Amendment support from the "Rule", at least as applied to non-documentary evidence. This Court recognized that the blood was wanted solely for its evidential value and the blood could not be classed as either means, fruits or contraband. This Court held that the taking of the blood involved a search and seizure within the meaning of those terms under the Fourth Amendment. Therefore, when this Court found the search for and the seizure of the blood in *Schmerber* reasonable under the Fourth Amendment, it necessarily also found that the search for and seizure of the clothing here was reasonable under the Fourth Amendment.

After *Schmerber* has removed Fourth Amendment and Fifth Amendment support from the "Rule", at least as applied to non-documentary evidence, the "Rule" itself must fall as not being one of constitutional dimensions. If neither the Fourth Amendment nor the Fifth Amendment standing alone requires the exclusion of the clothing here, then no interaction of the two Amendments should require exclusion of the clothing.

The "Rule" is artificial and illogical. Law enforcement efforts are directed to obtaining relevant evidence. This Court has asked that greater emphasis be placed on scientific investigation. The "Rule" impedes this, without protecting any important right of the accused. The very same items which were excluded in the instant case would be admitted in evidence in only slightly different factual

situations. If Mr. Hayden was wearing the clothing when he was arrested, it could have been seized. If the clothing was a disguise, it was an instrumentality and could have been seized. Many courts would call the clothing here an instrumentality even if not used as a disguise, and would, therefore, approve the seizure. It is impossible to believe that an amendment to the constitution which demands reasonableness, requires the courts to make meaningless, unreasonable and illogical distinctions.

The "Rule" has caused much confusion and inconsistency in the courts, especially in the area of when an item is, and when it is not, an instrumentality of crime. Even this Court has had great difficulty in determining whether an item is or is not an instrumentality. The lower federal courts and the state courts have had even more difficulty. The majority Opinion below recognized that in order to avoid the "Rule" judges stretch to the point of distortion the category of instrumentalities of crime. This inconsistency and confusion among the courts promotes injustice. Some apologists for the "Rule" suggest that the distortion be carried even further. A "Rule" which encourages reasonable men to use distortion to avoid the "Rule" has outlived its usefulness.

In the beginning, there was hope that the "Rule" would help to prevent exploratory searches and unnecessary invasions of privacy. The "Rule" has accomplished nothing in this regard. Exploratory searches incident to a lawful arrest are condoned, if items technically classified as means, fruits or contraband are discovered, even if they relate to another crime other than the one for which an accused is subject to arrest.⁶ If it is desired to limit exploratory searches this should be done by attacking the problem directly. The "Rule" achieves no legitimate purpose and

⁶ *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947).

causes inconsistency and confusion. Therefore, the "Rule" should be abandoned.

II.

Maryland has a contemporaneous objection rule which has been consistently applied by the Court of Appeals of Maryland to deny relief on the ground of waiver where proper objection was not made in the trial court. The Maryland courts have recognized that such a rule has useful and sound objectives. This Court has recognized that a contemporaneous objection rule does serve a legitimate state interest.⁷ The failure to make a contemporaneous objection deprives the state and the court of the right to decide not to use the evidence in order to avoid any possibility of error. In this case the decision not to object was an important part of the trial tactics of counsel.

The Court below did not consider waiver since the Court incorrectly believed that the Court of Appeals of Maryland had failed to apply the contemporaneous objection rule in this case. Since Mr. Hayden had not taken a direct appeal, the Court of Appeals of Maryland, in considering his Application for Leave to Appeal under the Post Conviction Procedure Act, did not have a transcript of Mr. Hayden's trial. Since there was no testimony taken at the post conviction hearing, the Court of Appeals of Maryland did not know whether or not a contemporaneous objection had been made. The Court of Appeals of Maryland, therefore, remanded so that the post conviction judge could hold a hearing which would meet all the tests of *Townsend v. Sain*,⁸ in order to determine all the facts with regard to the introduction of the evidence including whether or not there had been a proper objection. The Court of Appeals of Maryland never had sufficient facts to determine

⁷ *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965).

⁸ 372 U.S. 293, 9 L. Ed. 2d 770 (1963).

whether or not the contemporaneous objection rule was applicable. Now that the transcript of the trial is available, it is obvious that there was a failure to object and therefore a waiver.

There were no exceptional circumstances here which excused the failure to object. In fact, trial counsel had strategic reasons for not entering an objection to the introduction of the clothing into evidence. In *Henry v. Mississippi, supra*, this Court recognized that a counsel's trial strategy could waive an accused's rights to assert constitutional claims even where the strategy backfired. Trial counsel was widely experienced in criminal cases and was found by the District Court to have competently represented Mr. Hayden. Trial counsel must be the manager of any litigation and strategic decisions arrived at in good faith by competent counsel must be binding upon the defendant. To hold otherwise would encourage sterile and unimaginative defense counsel. Trial counsel for valid strategic reasons decided not to object. Therefore, the failure to object was a waiver which was binding upon Mr. Hayden.

ARGUMENT

I.

The Fourth Amendment to the Constitution of the United States Permits Reasonable Seizures of Relevant Evidential Material, Obtained in the Course of a Reasonable Search Pursuant to A Lawful Arrest.

A. THE "RULE" APPLIED BY THE MAJORITY OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT TO EXCLUDE THE NON-DOCUMENTARY EVIDENCE (CLOTHING) IS HISTORICALLY UNJUSTIFIED.

The Fourth Amendment to the Constitution of the United States only prohibits unreasonable searches and/or unrea-

sonable seizures. There is no basis in history or in logic to hold that the seizure of the clothing here was unreasonable within the meaning of that term under the Fourth Amendment.

The majority Opinion and the dissenting Opinion of the United States Court of Appeals for the Fourth Circuit recognized that the arrest was lawful, that the search was incident to the arrest and was reasonable, and that the seizure of all items other than the clothing was reasonable (R. 137, 146).

However, the majority Opinion held that *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921) and *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932) established a "Rule" which required the Court to hold that the clothing that Mr. Hayden wore when he committed the felony was not subject to seizure, even though it was discovered during a reasonable search of Mr. Hayden's home, pursuant to a lawful arrest of Mr. Hayden in "hot pursuit" (R. 137-138). The dissent vigorously disagreed. The majority felt constrained to apply the "Rule" though they and the dissent thought it was timely for this Court to expose the "Rule" to re-examination and re-interpretation (R. 144, 150).

The alleged "Rule" which the majority Opinion reluctantly felt constrained to follow is sometimes called the "Gouled Rule" or the "Mere Evidence Rule". In this Brief the "Rule" will be referred to as the "Gouled Rule" or the "Rule" and not by the misnomer "Mere Evidence Rule".

As shown by the facts in this case the evidence which may be excluded by the "Rule" is significant and relevant and is by no means "mere evidence". It should not be so called. The "Rule" if it really is a "Rule", must be recog-

nized for what it actually does. It requires that relevant evidence, reasonably obtained, be excluded if it cannot technically be classed as a means or instrumentality of committing a crime, the fruits of a crime, or contraband.

In *Gouled and Lefkowitz*, this Court said that some inter-action of the Fourth and Fifth Amendments to the Constitution of the United States, with apparent emphasis on the Fifth Amendment privilege against self-incrimination, required the exclusion of incriminating documentary evidence which could not be classified as means, fruits or contraband.¹ The establishment of such a "Rule" is in no way required by the Fourth or Fifth Amendment or any inter-action of the two. The one recent Note² which treats the "Rule" most favorably, and the one recent Comment³ which most clearly documents the fallacy of the "Rule" both recognize that historically the rationale of such a "Rule" is open to question.

¹ In the Brief in Opposition to Petition for Writ of Certiorari filed on behalf of Mr. Hayden in this Court at pp. 5-6, the Respondent recognizes the fact that emphasis has been placed upon the Fifth Amendment in the support for the "Rule". Respondent recognizes that all of the cases in this Court involving the "Rule" have dealt with private papers. The Respondent argued that since this case deals with clothing, which is readily distinguishable from private papers, this Court should not have granted the Petition for Writ of Certiorari. See also Shellow, "The Continuing Vitality of the *Gouled* Rule: The Search for and Seizure of Evidence, 48 Marq. L. Rev. 172, 174-175 (1964); Comment, "The Fourth and Fifth Amendments — Dimensions of an 'Intimate Relationship' ", 13 U.C.L.A. L. Rev. 857 (1966); Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 605-606, 623-625 (1966); Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 360-361 (1966); Comment, "Limitations on the Seizure of 'Evidentiary Objects' — A Rule in Search of a Reason", 20 U. Chi. L. Rev. 319-320 (1953).

² Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 597-600.

³ Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 359-366.

The Fourth Amendment was adopted primarily for the purpose of forbidding the unlimited power to invade privacy by general warrants and writs of assistance, issued without probable cause, and there is no historical evidence that the Fourth Amendment was in any way premised on a self-incrimination concept.⁴ It is interesting to note that in its original formulation, the Fourth Amendment would have provided that the right to be secure "against unreasonable searches and seizures shall not be violated by warrants issuing without probable cause, supported by oath or affirmation and not particularly describing the place to be searched and the person or things to be seized."⁵ Therefore, an otherwise reasonable search, pursuant to a lawful arrest, or a search based on a warrant, which described the items to be seized with sufficient particularity, would not have been considered to be unreasonable within the meaning of that term in the Fourth Amendment merely because the search discovered relevant evidence which could not technically be classed as means, fruits or contraband.

The Fifth Amendment was adopted primarily to prevent the practice of compelling an accused to give evidence against himself.⁶ A person subjected to a search is in no way required to assist the government in producing testimony for use against himself and need not act at all.

⁴ Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 365-366; Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L. Rev. 593, 597.

⁵ Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 365-366.

⁶ Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 597; Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 362.

Therefore, no element of self-incrimination is present in a search.⁷

That an otherwise reasonable search which produces relevant evidence which cannot be classed as means, fruits or contraband should not be considered unreasonable within the meaning of that term in the Fourth Amendment, and should not be considered to violate a person's privilege against self-incrimination under the Fifth Amendment, is further confirmed by an analysis of *Gouled* and *Lefkowitz* and their antecedents.⁸

Lefkowitz relied solely on *Gouled* when the "Rule" was discussed in the *Lefkowitz* Opinion.⁹ *Gouled* relied on the case of *Boyd v. United States*, 116 U.S. 616, 29 L. Ed. 746 (1886). The *Boyd* case found it to be a violation of the

⁷ See *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 110, cert. den. 384 U.S. 908, 16 L. Ed. 2d 361 (1966); Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 362. In a Comment which basically approves of the "Rule", "The Fourth and Fifth Amendments — Dimensions of an 'Intimate Relationship'", 13 U.C.L.A. L. Rev. 857, 863-866, the author strongly suggests that the use of the Fifth Amendment at all in search and seizure cases is improper. The Comment was apparently written before this Court's Opinion in *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966) and does not cite *Schmerber*. In a subsequent section of this Brief, the State will urge that the *Schmerber* case completely removes both Fourth and Fifth Amendment support from the "Rule". As the State will point out in that section of the Brief, this Court did not qualify its removal of Fifth Amendment support from the "Rule" at least when non-documentary evidence is involved, and therefore the author's indication that the Fifth Amendment is improperly applied in search and seizure cases has been approved at least when considering non-documentary evidence. In the case of *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191-192 (1965), the Supreme Court of New Jersey also seemed to predict the *Schmerber* holding, which totally removes Fifth Amendment support from the "Rule", at least as to non-documentary evidence.

⁸ *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

⁹ *United States v. Lefkowitz*, 285 U.S. 452, 464-465, 76 L. Ed. 877, 882 (1932).

Fifth Amendment to the Constitution of the United States to compel the production by subpoena of a self-incriminating document. As indicated previously, a search and seizure does not compel a person to actively produce testimony for the government, but a subpoena does require active participation. There is some possible justification for applying the Fifth Amendment in the *Boyd* factual situation, but that justification is not carried over to the factual situations of either *Gouled* or *Lefkowitz*.¹⁰

The *Boyd* case did indicate that a combination of the Fourth and Fifth Amendments to the Constitution of the United States required a finding that the issuance of the subpoena was improper.¹¹ In finding a violation of the Fourth Amendment, the *Boyd* case relied heavily on the English case of *Entick v. Carrington*, 19 Howell State Trials 1029 (1765). However, in *Entick*, that which was condemned was a general warrant issued by the Secretary of State which lacked particularity, had been issued without a show of probable cause, and which authorized and resulted in an indiscriminate search among, and a seizing of, the plaintiff's private papers.¹²

It is therefore, apparent that *Entick* would stand for the proposition that a restricted search pursuant to a lawful arrest, carried on in a reasonable manner, or a search under a warrant issued upon probable cause, stating with particularity the items to be seized, would be reasonable, even if the relevant evidence found could not be classed as means, fruits or contraband.

¹⁰ See Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 362.

¹¹ *Boyd v. United States*, 116 U.S. 616, 622, 29 L. Ed. 746, 748 (1886).

¹² See *Boyd v. United States*, 116 U.S. 616, 626, 29 L. Ed. 746, 749 (1886); Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 364-365.

It has been argued with considerable justification, with regard to *Gouled* and *Lefkowitz*,¹³ that the search in each case was itself exploratory and, therefore, unreasonable under the Fourth Amendment, whether or not the relevant evidence actually found, technically, could be included in the classification of means, fruits or contraband.¹⁴ The State contends that *Gouled* and *Lefkowitz* rely on a combination of the type of search and the type of item searched for to find that the search, not the seizure, is unreasonable under the Fourth Amendment.

The majority Opinion requires an attempt to distinguish relevant evidence which cannot be classed as means, fruits or contraband, from relevant evidence which can be classed as means, fruits or contraband, without any basis in history or logic for requiring Courts to make such a distinction. In the very few cases in which the distinction was set out, and was purportedly used to exclude relevant evidence, it was apparent that the evidence could have been excluded without making the distinction. Therefore, a distinction between means, fruits and contraband and other relevant evidence is not required by either the Fourth or Fifth Amendment to the Constitution of the United States.

¹³ *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

¹⁴ E.g., in *Golliher v. United States*, 362 F. 2d 594, 599 (8th Cir., 1966), the Court upheld the seizure of clothing from the person of the individuals arrested and indicated that in *Gouled v. United States* and *United States v. Lefkowitz* this Court merely rightfully condemned general exploratory searches. See also *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191 (1965). (In *Bisaccia*, the Court found that browsing among private papers from its very nature involves an exploratory search which is indistinguishable from a search under a general warrant which would be outlawed by the Fourth Amendment); *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 112 (1966). (In *Thayer* the Court states that in every instance the central issue is the legality of the search, not the legality of the seizure, and when the search is so broad as to be exploratory, then the "Rule" is used as an alternative and superfluous ground for exclusion.)

B. THE "RULE" WAS NOT MEANT TO APPLY TO NON-DOCUMENTARY EVIDENCE.

The entire Court below recognized that this Court has never applied the "Rule" to non-documentary evidence (R. 139, 149). The majority Opinion further recognized that *Gouled* and *Lefkowitz*¹⁵ are the only two cases in which this Court has applied the "Rule" to exclude even documentary evidence.¹⁶ The majority Opinion applied the "Rule" to the clothing here since the majority perceived no "rational distinction" between private papers that are of evidential value only and articles of clothing which are of the same character (R. 142).

There is a very valid "rational distinction" between private papers that are of evidential value only and articles of clothing that are alleged to be of evidential value only, and the Supreme Court of New Jersey so well expressed the distinction in the case of *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191-192 (1965), that the exact language of that Court is set forth in the footnote below.¹⁷ Chief Judge

¹⁵ *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921); *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932).

¹⁶ Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 368-369.

¹⁷ "There is a marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect. As we have said, private papers are almost inseparable from the privacy and security of the individual. To browse among them in search of anything inculpatory involves an exploratory search indistinguishable from the search under the general warrant which the Fourth Amendment intended to outlaw. . . . Indeed, even a search for a specific, identified paper may involve the same rude intrusion if the quest for it leads to an examination of all of a man's private papers. Hence it is understandable that some adjustment may be needed, and presumably it is to that end that a search may not be made among a man's papers for a document which has evidential value alone. Even as to private papers, this 'mere evidence' limitation upon

Haynsworth also recognizes a distinction between the search for and seizure of a diary containing incriminating entries and the search for and seizure of clothing (R. 149-150).

The Supreme Court of New Jersey reviewed the history of the "Rule" going back to the case of *Entick v. Carrington*¹⁸ and indicated that in the *Entick* case Lord Camden did not find any restraint on the Crown's right to search, but in order to protect the innocent from oppression a "paper-search" under the general warrant was intolerable.¹⁹

Unfortunately, the Fourth Circuit did not have the benefit of this Court's decision in the case of *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966). If it had, the result below might have been different. In a subsequent section of this Brief the State will contend that the *Schmerber* case completely strips any Fifth Amendment support from the "Rule", at least as applied to non-documentary evidence. Once it is clear that the Fifth Amendment privilege against self-incrimination cannot be used as part of the justification for the "Rule", then the

a search is not an easy line to defend, but Judge Learned Hand did find in it a redeeming feature . . .

* * * * *

"But a search for other tangibles involves none of the hazards which concerned the courts in *Entick* and *Boyd*. There is no rummaging through a man's private files, no exposure of their intimacies and confidences. We must remember that the Fourth Amendment prohibits 'unreasonable' searches and seizures and that the rule of *Boyd* is simply an application of the rule of unreasonableness to the specific subject matter there involved. When that rule or any other subsidiary rule evolved in the application of the Fourth's prohibition against unreasonableness is sought to be applied beyond the setting in which the subsidiary rule was devised, we must measure the proposed application against the basic test laid down in the Amendment itself and ask whether the search or seizure is unreasonable." (Citations omitted.)

¹⁸ *Entick v. Carrington*, 19 Howell State Trials 1029 (1765).

¹⁹ *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 190 (1965).

"rational distinction" between private papers and articles of clothing becomes even more apparent.

On two occasions the United States Court of Appeals for the District of Columbia Circuit apparently applied the "Rule" to exclude non-documentary evidence even though it was not necessary in either case to utilize the "Rule".²⁰ Other courts at both the federal and state level, and many of the most informed writers in this area of the law have seriously questioned whether the "Rule" ever was intended by this Court to apply to non-documentary evidence.²¹

While this Court has indicated that there is no special sanctity given to documents, that language was used by this Court to justify the fact that even documents may be seized when they fit into the technical category of means, fruits or contraband.²² This language in the context in

²⁰ *Morrison v. United States*, 262 F. 2d 449, 450 (D.C. Cir., 1958); *Williams v. United States*, 263 F. 2d 487, 488 (D.C. Cir., 1959). In *Morrison*, the officers entered the house of Morrison without a warrant, after knocking and receiving no answer, and engaged in the search knowing that Morrison was not there. The search itself was unreasonable. In *Williams* there was no search warrant and no arrest and the Court believed that none of the conditions for a reasonable search existed.

²¹ E.g. *Gilbert v. United States*, 366 F. 2d 923, 933 (9th Cir., 1966); *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191. Even so staunch an exponent of individual liberties as Professor Kamisar, in addition to criticising the "Rule" as unsound and undesirable, indicated that the application of the "Rule" in *Morrison v. United States*, 262 F. 2d 449 (D.C. Cir., 1958) to the handkerchief seized therein, was questionable, and stated that it is not clear even in the federal courts that the "Rule" extends to non-documentary evidence. Kamisar, "Public Safety v. Individual Liberties: Some 'Facts and Theories'", 53 J. Crim. L., C. & P. S. 171, 177 (1962). See also Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 368-369; Comment, "Limitations on the Seizure of 'Evidentiary Objects' — A Rule in Search of a Reason", 20 U. Chi. L. Rev. 319 (1953).

²² *Gould v. United States*, 255 U.S. 298, 309, 65 L. Ed. 647, 652 (1921); *United States v. Kirschenblatt*, 16 F. 2d 202, 204 (2d Cir., 1926).

which it was used cannot support an unjustified application of the "Rule" to non-documentary evidence.

This Court has never applied the "Rule" to non-documentary evidence. The "Rule" itself even as applied to documentary evidence has been severely criticised. When other courts have felt required by the decisions of this Court to extend the "Rule" to non-documentary evidence, such extension has been severely criticised. There is no possible justification in history or in logic for extending the "Rule" to non-documentary evidence.

C. THE FOURTH AMENDMENT DOES NOT REQUIRE THAT THE "RULE" BE APPLIED TO THE STATES.

In that part of the Opinion in *Ker v. California*²³ in which eight of the justices joined (Justice Harlan, who did not join, expressed the view that the Fourth Amendment is not applicable to the states and that in judging state searches and seizures he would continue to adhere to the established Fourteenth Amendment concepts of fundamental fairness), it was stated that:

"The Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution."

* * * * *

"The States are not thereby precluded from developing workable rules governing arrests, searches and sei-

²³ *Ker v. California*, 374 U.S. 23, 33-34, 10 L. Ed. 2d 726, 737-738 (1963).

zures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

It appears from the language quoted above that not all of the cases in the federal courts which considered the reasonableness of searches and seizures would be binding upon the states. Where evidence is held inadmissible as a result of this Court's supervisory power over inferior federal courts, the states would not be required to follow the federal lead. It has been suggested that though the *Gouled* case ²⁴ indicated that the Fourth and Fifth Amendments were being applied in order to exclude the incriminating documentary evidence involved, the use of the Fourth and Fifth Amendments was unnecessary to the decision since the decision could have been based upon a statute and on this Court's supervisory power.²⁵

Since shortly prior to the time of *Gouled* to the present, there has been a federal statute or rule which purports to limit the types of items which may be seized under a search warrant. The statute involved at the time of *Gouled* was the Act of June 15, 1917, Chapter 30, 40 Stat. 228, which was the first general search warrant statute and is nearly identical to the present Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 41(b).^{25a} *Gouled* and all later cases could mean that the search is unreasonable in federal cases since it is not authorized by the federal statute or the federal rule involved.

²⁴ *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921).

²⁵ See *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 111; Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 360, footnote 34.

^{25a} *Ibid.*

In addition, the State contended in a previous section of this Brief that in the cases in which the "Rule" was used to exclude incriminating documentary evidence, the Court apparently found the search to be exploratory both in and of itself and because of the type of item being searched for. Such a combination theory to find the search and not the seizure to be exploratory and, therefore, unreasonable, would necessarily be part of the Court's supervisory power rather than a constitutional prohibition applicable to the states.

In spite of this, the Majority Opinion in the Fourth Circuit held that the "Rule" is one of constitutional dimensions. The Supreme Court of California disagreed.²⁶ That Court cited *Ker*^{26a} and recognized that:

"Federal rules based on the supervisory powers of the United States Supreme Court over the administration of justice in the federal courts, however, are not binding on the states."²⁷

Whether or not this Court believes that the "Rule" should retain any validity in the federal courts as the result of this Court's supervisory power over the federal courts, this Court should hold that it will not, like Procrustes, tie the states and their reasonable search and seizure rules upon an iron bed and then shape them to conform to the size of the bed. If, as was said by eight of the justices in *Ker*, the states are to be allowed to develop workable rules governing searches and seizures, this particular area of searches and seizures should be left to the states for their own determination.

The "Rule" as applied below is itself unreasonable. Such an application has been consistently condemned. As the Supreme Court of California states:

²⁶ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 112.

^{26a} *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726 (1963).

²⁷ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 110.

"The asserted rule that mere evidence cannot be seized under a warrant or otherwise is condemned as unsound by virtually all the modern writers."²⁸

Even the majority Opinion below suggested that this Court expose the "Rule" to re-examination and reinterpretation (R. 144).

Most of the states which have been faced with the problem have indicated displeasure with the "Rule" whether or not they felt constrained to follow it.²⁹ It is interesting to note that seven States — New York, Illinois, Minnesota, Oregon, Vermont, California and Nebraska — have recently enacted statutes specifically authorizing the issuance of a search warrant for evidentiary matter.³⁰

The Maryland statute³¹ does not specifically mention purely evidentiary matter, but the Maryland cases under the statute have authorized the search for and seizure of items which do not fit into the classification of means, fruits or contraband.³²

²⁸ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 109.

²⁹ E.g. *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185; *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108; In the case of *State v. Coolidge*, 106 N.H. 186, 208 A. 2d 322, 333 (1965) the Court indicates that in the absence of a specific statutory restriction, the Courts usually hold that any property may be seized which will furnish proof of crime.

³⁰ Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 594; In addition, New Jersey also has such a statute. See *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 186 (1965); Nevada also has such a statute. See *Eisentragar v. State*, 79 Nev. 38, 378 P. 2d 526 (1966).

³¹ Article 27, Section 551, Annotated Code of Maryland (1966 Cumulative Supplement). The statute authorizes the issuance of a search warrant to seize any property found liable to seizure under the criminal laws of the State.

³² *Davis v. State*, 236 Md. 389, 397, 204 A. 2d 76, 81 (1964) — bloodstained shoes and clothing in a murder case; *Matthews v. State*, 228 Md. 401, 403, 179 A. 2d 892, 893 (1962) — soiled sheets in prosecution for keeping a disorderly house; *Shorey v. State*, 227 Md. 385, 389, 177 A. 2d 245, 247 (1962) — bloodstained clothes and soiled trousers in a rape case; *Lucich v. State*, 194 Md. 511, 516, 71 A. 2d 432, 434 (1950) — laundry slips in a prosecution for keeping a disorderly house.

Consistent displeasure with the "Rule" is evidence of its own unreasonableness. It should not be applied to the states in the name of a constitutional amendment which itself asks only for reasonableness. Since the *Ker* case³³ shows the way to give some latitude to the state courts, and since *Gouled*³⁴ does not necessarily require that the distinction between means, fruits and contraband and other relevant evidence is of constitutional dimensions, this Court should not apply the "Rule" to the states.

D. THE SCHMERBER CASE³⁵ ESTABLISHES THAT THE CLOTHING IS PROPERLY ADMISSIBLE IN EVIDENCE UNDER BOTH THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

1. *Under the holding in Schmerber, the seizure of the clothing does not involve the privilege against — self-incrimination under the Fifth Amendment.*

The Petitioner in the *Schmerber* case had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had been driving. The police desired that Schmerber submit to a blood test in order to have his blood analyzed to determine the percentage of alcohol in his blood. The Petitioner, on advice of counsel, refused to consent to a blood test. In spite of the refusal of Schmerber to submit to the blood test, at the direction of a police officer, a blood sample was withdrawn from Schmerber's body by a physician. The analysis of the sample taken indicated intoxication and this was admitted at the trial. Schmerber was convicted of driving an automobile while under the influence of intoxicating liquor. This Court in *Schmerber* realized that in requiring an individual to submit to the withdrawal and

³³ *Ker v. California*, 374 U.S. 43, 10 L. Ed. 2d 726 (1963).

³⁴ *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647 (1921).

³⁵ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence which could be used against him³⁶. It is obvious that the evidence which the State compelled him to produce does not fit into the technical classification of means, fruits or contraband. A man's own blood is neither the means nor the fruits of a crime and is, of course, not contraband. Even though Schmerber was compelled to produce for the State relevant evidence against himself which could not be classed as means, fruits or contraband, this Court held that such withdrawal and chemical analysis of blood does not violate a person's privilege against self-incrimination under the Fifth Amendment. This Court held that the Fifth Amendment privilege against self-incrimination only applies to compelling an individual to provide the State with evidence of a testimonial or communicative nature.³⁷

Like the blood in *Schmerber*, the clothing here is not evidence of a testimonial or communicative nature. Therefore, after *Schmerber*, there can be no contention that the Fifth Amendment in any way precludes the admission into evidence of the clothing in the instant case. There was far less compulsion to incriminate and far less invasion of privacy in obtaining the clothing in this case than in obtaining the blood in the *Schmerber* case.

Since the Fifth Amendment privilege against self-incrimination has been such a vital part of any effort to explain or justify the "Rule", the fact that *Schmerber* establishes that the Fifth Amendment does not apply with regard to non-documentary evidence indicates that at least as to non-documentary evidence the "Rule" has no further validity.

³⁶ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 914 (1966).

³⁷ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 914 (1966).

2. *Under the holding in Schmerber³⁸ the search for and seizure of the clothing was reasonable under the Fourth Amendment.*

In the *Schmerber* case, after completely stripping any Fifth Amendment support from the "Rule" as applied to non-documentary evidence, this Court next completely removed Fourth Amendment support from the "Rule". This Court said:

"We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

The above quotation as applied to the instant case could be paraphrased somewhat in the following manner: We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the tangible effects of a person being arrested; for clothing to be analyzed, for bloodstains, semen stains, paint scrapings, or just to identify the clothing worn during the commission of the felony, "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

A comparison of the factual situations in *Schmerber* and in the instant case can only establish that the seizure here is more easily justified than the seizure in *Schmerber* and that the manner in which the item was seized was at least as proper. In this case the police had the right

³⁸ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

and duty to be in the house, and the right and duty to be searching for the weapon and the money. In the course of that search the clothing was found. No greater intrusion on Mr. Hayden resulted in the discovery of clothing. Any reasonable man would have recognized the relevance of the clothing since it had been described by the eyewitnesses and the condition of the clothing, with the leather belt in the pants, indicated that it was discarded in haste. To say that there would be anything improper in taking the clothing under these circumstances, and yet to say that the taking of a man's blood against his will is proper, would only increase the confusion surrounding the "Rule" and only increase the great distaste generally felt toward the "Rule".

This Court recognized in *Schmerber* that the blood was wanted solely for its evidentiary value³⁹ and, of course, could not be classified as either means, fruits, or contraband. This Court held that the taking of the blood under the circumstances involved a search and seizure within the meaning of the Fourth Amendment.⁴⁰ Immediately thereafter this Court said that since it was not dealing with property relationships, the Court could write on a clean slate. With this language the State respectfully disagrees. A man's blood is his property just as surely as his personal

³⁹ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 915 (1966). This Court said:

"The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is *evidence of criminal guilt*. Compelled submission fails on one view to respect the 'inviolability of the human personality.' Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused 'by its own independent labors.'" (Emphasis supplied.)

⁴⁰ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 915 (1966).

effects, such as clothing, are his property.⁴¹ Therefore, this Court was dealing with property relationships in *Schmerber* and it did not write on a clean slate. When this Court found a search for and seizure of the blood in *Schmerber* reasonable within the meaning of that term under the Fourth Amendment, this Court, necessarily, also found that the search for and the seizure of the clothing, here, was reasonable within the meaning of that term under the Fourth Amendment.

This Court has consistently indicated that only unreasonable searches or seizures are prohibited by the Constitution. In the case of *Harris v. United States*, 331 U.S. 145, 150, 91 L. Ed. 1399, 1405 (1947) this Court said:

"This Court has also pointed out that it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its own facts and circumstances.'"

In *United States v. Rabinowitz*, 339 U.S. 56, 63, 94 L. Ed. 653, 659 (1950), this Court said:

"What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

⁴¹ It is common knowledge that many individuals make a practice of selling their blood a pint at a time. It is also common knowledge that when an individual needs a blood transfusion in a hospital, unless the individual and his family and friends replace the amount of blood he receives, pint by pint, then the individual must pay an additional charge for the blood he has received over and above all other hospital charges associated with the transfusion.

Under the facts and circumstances in the instant case, neither the search nor the seizure can be found to be unreasonable. Since it is reasonable within the meaning of the Fourth Amendment for a law enforcement officer to take a man's blood, against his will, and without a warrant, solely in order to use the result of a chemical analysis in evidence, it is also reasonable within the meaning of the Fourth Amendment to seize, as part of a reasonable search, the clothing worn while committing the felony, which was observed by the witnesses to the felony.

Mr. Schmerber, after being arrested, was required to submit to the further indignity and the further invasion of his privacy, of having his blood withdrawn from him against his will. In this case, Mr. Hayden suffered no further indignity or invasion of his privacy, since the search was being conducted legally and reasonably in order to find the other means of committing the crime (the weapon used, which was found) and the fruits of the crime (the money taken, which was not found).

This Court in *Schmerber* recognized that a search warrant could have been procured in order to obtain the blood from Mr. Schmerber. This Court held, however, that it was reasonable not to obtain the warrant before taking the blood since the "evidence" might be destroyed.⁴²

⁴² *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 919-920. It is interesting to note that in the case of *Trupiano v. United States*, 334 U.S. 699, 92 L. Ed. 1633 (1948) this Court held that in a search incident to an arrest, the search and seizure would be unreasonable within the meaning of that term under the Fourth Amendment if there was time to obtain a search warrant and a search warrant was not obtained. Two years later, in *United States v. Rabinowitz*, 399 U.S. 56, 94 L. Ed. 653 (1950) this Court overruled *Trupiano* and found that the failure to obtain a search warrant did not necessarily make the search and seizure unreasonable under the Fourth Amendment.

In *Schmerber*, while the officer could have believed that the analysis of the blood was quite vital, he also should have known that since he, and at least one independent third party, the doctor, was available to testify as to Mr. Schmerber's intoxicated condition, the immediate seizure of the blood might not have been crucial. In the instant case, only the officer had seen the clothing and the condition it was in, in the washing machine. If he had not taken it, it could have been destroyed.

In any event, if it is conceded that the officer could have testified as to what he saw in a reasonable search, it is illogical to say that he could testify about the clothes, but could not take them. A picture is worth a thousand words, and having the clothing in court, in the same condition in which it was found, is much fairer to the law enforcement officials and to the accused himself.⁴³

For all of the above reasons, it is obvious that the seizure of the clothing here was even more reasonable within the meaning of that term under the Fourth Amendment than the seizure of the blood in *Schmerber*. Since all that the Fourth Amendment asks for is that a search be reasonable and the seizure be reasonable, there was no violation of Mr. Hayden's rights under the Fourth Amendment when the clothing was seized and admitted into evidence.

⁴³ It is quite possible that if the officer had not seized the clothing a claim could have been made by the accused, that the State was suppressing evidence. This point will be discussed further in a section of this Brief covering waiver by failure to object. In that section the State will contend that Mr. Hayden's experienced trial counsel wanted the clothing in evidence so that he could attempt to test the credibility, and the ability to distinguish colors, of the various witnesses.

3. *Under the holding in Schmerber^{43a} the rationale for the "Rule" fails, at least with regard to non-documentary evidence.*

Once the Fourth Amendment and Fifth Amendment support is stripped from the "Rule", at least as applied to non-documentary evidence, such as the clothing in the instant case, the "Rule" itself must fall, as not being one of constitutional dimensions. The one Comment which treats the "Rule" most favorably offers a rationale for the "Rule" which seems to lose all its vitality in the light of the *Schmerber* case holding that neither the Fourth Amendment, nor the Fifth Amendment, bars the compulsory search for and seizure of the blood of an individual for use as testimony against him. The author of the Comment states:

"*Boyd and Gouled* offer a rationale as simple as it is sound. The fifth amendment forbids any form of compulsion to obtain evidence from the accused. A search warrant, commanding obedience under pain of law is a form of compulsion. Therefore, a search warrant may not issue for the sole purpose of forcing an accused to turn over his property to the government so that the latter may introduce it against him at trial. Thus read, *Gouled* does indeed seem to be a rule with a reason founded upon history, precedent, and logic. And, thus read, there seems to be no valid reason for a differentiation between property of the defendant that happens to be papers or books and other types of property. . . ." (Footnotes omitted).⁴⁴

After *Schmerber* this rationale is no longer valid as applied to non-documentary evidence and may not be valid

^{43a} *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

⁴⁴ Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 605-606.

even as to documentary evidence. There is no Fifth Amendment limitation on compelling production of non-documentary evidence since such evidence is not of a "testimonial" or "communicative" nature. There is no Fifth Amendment limitation on a search for documentary evidence because there is no compulsion upon the individual to actively produce the evidence for use by the government against him. He only passively submits to the search.

After *Schmerber* a comparison of the reasonableness of the seizure of the blood from Schmerber with the seizure of the clothing here can only establish that the seizure of the clothing here was more reasonable than the seizure of the blood in *Schmerber*. After *Schmerber* it must be conceded that when officers as part of a reasonable search, pursuant to a lawful arrest, discover and seize relevant evidence which can be classed as means, fruits or contraband, and also discover and seize relevant evidence which technically cannot be classed as means, fruits or contraband, both seizures are reasonable within the meaning of that term under the Fourth Amendment.

Therefore, after *Schmerber*, the rationale suggested by the Comment⁴⁵ amounts to this — the seizure of the clothing taken from Mr. Hayden's home is not barred by the Fifth Amendment standing alone, since the clothing is not of a "testimonial" or "communicative" nature; the seizure would not be barred by the Fourth Amendment standing alone, since both the search and the seizure were reasonable under the circumstances and in no way subjected Mr. Hayden to indignities or invasions of privacy over and above the search for and seizure of the guns and the money

⁴⁵ Comment, "Evidentiary Searches: The Rule and the Reason", 45 Geo. L.J. 593, 605-606.

(implements and fruits); therefore, the seizure should not be barred by any interaction of the two Amendments.

After *Schmerber* there is no possible justification for this Court to allow the "Rule" to apply to the clothing here, based upon the rationale suggested in the Comment or upon any other rationale.

The United States Court of Appeals for the District of Columbia Circuit (the Court which apparently applied the "Rule" to non-documentary evidence in the case of *Morrison v. United States*, 262 F. 2d 449-450 (D.C. Cir., 1958) and *Williams v. United States*, 263 F. 2d 487, 488 (D.C. Cir., 1959)) apparently believes that it is possible that the *Schmerber* case⁴⁶ has foreshadowed the doom of the "Rule" and cast doubt on the validity of the *Morrison* and *Williams* decisions.

In the case of *Fuller v. United States*, No. 19532, (Criminal No. 898-64), that Court requested supplemental memoranda on the implications of the *Schmerber* case, on the "Rule", when *Schmerber* was decided after the oral argument in *Fuller*. The facts of the *Fuller* case, as taken from the several Briefs of the Appellant and the Appellee, are that Fuller gave an oral confession in which he described the clothing he was wearing on the night of the rape-murder involved and informed the police that the clothing he wore was at his home. A search warrant was issued for this apparel and the warrant was executed and the clothes seized. If the United States Court of Appeals for the District of Columbia Circuit believed that the "Rule" which it approved in the *Morrison* and *Williams* cases retained any validity after *Schmerber*, that Court probably would have followed its own decisions in *Morrison*

⁴⁶ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

and *Williams* and would have excluded the evidence.⁴⁷ The Court, instead, requested the supplemental memoranda.

In Nedrud, "The Criminal Law 1967", Sample Section (October, 1966) the author states that after *Schmerber*:

"It is arguably settled that purely evidentiary matter can be seized whether as incident to arrest or even as the subject matter involved in a search warrant, thereby clarifying the question lingering in *Gouled v. United States*, 255 U.S. 298 (1921) and *United States v. Lefkowitz*, 285 U.S. 452 (1932) although these cases were not mentioned as such." At A-7.

Since *Schmerber* establishes that neither the Fourth Amendment nor the Fifth Amendment standing alone would bar the seizure of the clothing and its admission into evidence, there is no justification whatever for saying that any combination of the two Amendments requires exclusion.

E. THE "RULE" AS APPLIED TO THE FACTUAL SITUATION
BELOW AND OTHER SIMILAR FACTUAL SITUATIONS
IS ARTIFICIAL AND ILLOGICAL.

Even if we assume *arguendo* that the "Rule" has historical justification, is of constitutional dimensions and is applicable to the states, and *Schmerber*⁴⁸ does not abolish the "Rule", the "Rule" does not make sense when applied to a factual situation such as the one in the instant case.

Even persons whose point of view is basically defense-minded, criticize the logic of the "Rule":

"At the outset, the rule would seem to contravene common sense. It appears, particularly to those authors

⁴⁷ Another recent decision of a circuit court appears to cite *Schmerber* for the proposition that the police may seize clothing. *Hancock v. Nelson*, 363 F. 2d 249, 252 (1st Cir., 1966).

⁴⁸ *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966).

whose philosophical orientation favors the prosecution, that it is absurd to deny to searching officers the right to seize evidence of the very crime for which they have established probable cause. Even to those authors whose perspective ordinarily is that of defense counsel, the *Gould* rule appears an unwarranted extension of constitutional sanctions and a serious threat to effective law enforcement." (Footnotes omitted.)⁴⁹

In *Mapp v. Ohio*, 367 U.S. 643, 657, 6 L. Ed. 2d 1081, 1091 (1961) this Court said:

"There is no war between the Constitution and common sense."

Common sense dictates that law enforcement efforts be directed toward obtaining relevant evidence to help convict those who commit crimes. In the case of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 715 (1966), this Court said:

"[O]ur accusatory system of criminal justice demands that the Government seeking to punish an individual, produces the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

Chief Judge Haynsworth points out that this Court, in cases such as *Miranda*, has admonished the police to rely less on evidence of a "testimonial" or "communicative" nature and to place greater dependence upon their resources for scientific investigation (R. 150).⁵⁰

The police will be unable to rely on their resources for scientific investigation if they are not allowed to seize, as

⁴⁹ Shellow, "The Continuing Vitality of the *Gould* Rule: The Search for and Seizure of Evidence", 48 Marq. L. Rev. 172, 175. The author is a practicing attorney who is a member of the National Association of Defense Lawyers in Criminal Cases, American Judicature Society. See also, *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 109 (1966); *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 187-188, 192 (1966).

⁵⁰ See also, *Golliher v. United States*, 362 F. 2d 594, 601 (8th Cir., 1966).

part of a reasonable search, the clothing and subject it to analysis, or to take the shoes and match them with footprints discovered at the scene of a crime. It is not common sense to ask the police to rely on scientific investigation and then to completely restrict their ability to do so without having any valid reason for any such restriction. It is not logical to say that a search and seizure which is otherwise reasonable becomes unreasonable merely because in the course of a search for relevant evidence which may be classed as means, fruits or contraband, the officers also discover relevant evidence which technically does not fit into an, at best, arbitrary, illogical and confusing classification of means, fruits and contraband.

The Supreme Court of California supplies very cogent reasoning as to why the "Rule" should not be applied in any factual situation:

"Although often invoked in cases involving the seizure of papers, the rule is not limited to papers at all but purports to prohibit the seizure of any object that is merely evidentiary. The rationale for this curious doctrine has never been satisfactorily articulated. *It creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant.* A person has a constitutional right to be secure from unreasonable searches and seizures by the police. When the search itself is reasonable, however, it is impossible to understand why the admissibility of seized items should depend on whether they are merely evidentiary or evidentiary plus something else." (Emphasis supplied.)⁵¹

A review of some cases in which the very same items which are excluded by the "Rule", as applied by the majority below, are admitted under only slightly different factual situations further shows that the "Rule" is illogical.

⁵¹ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 109 (1966).

There is no magic attached to non-documentary evidence such as clothing, and clothing may be seized and subjected to analysis, and the clothing or the results of the analysis may be introduced into evidence if the accused happens to be wearing the clothing when he is arrested.⁵² In the Brief in Opposition to Petition for Writ of Certiorari filed on behalf of Mr. Hayden at p. 7, the Respondent argues that the cases which recognize the right of law enforcement officials to seize clothing, which a person arrested is wearing, and subject that clothing to laboratory analysis should not be persuasive here since such a seizure doesn't subject the accused to any further burden or indignity. It must be recognized here that the seizure of the clothing from the washing machine subjected Mr. Hayden to no further burden or indignity since the officers had the right and duty to search for the money and the guns and the clothing was discovered in the course of that search. Therefore, if the reasoning behind the cases which allow the seizure of clothing if the accused is wearing it is that there is no further burden or indignity suffered, then that reasoning applies equally to the instant factual situation and therefore the majority Opinion below improperly excluded the clothing from evidence.

The dissenting Opinion questions how the clothing was "instantaneously immunized" by Mr. Hayden's disrobement (R. 146). The instantaneous immunizing is even more surprising in view of the fact that the reason for his disrobement was to avoid detection.

⁵² *Hancock v. Nelson*, 363 F. 2d 249 (1st Cir., 1966); *Golliher v. United States*, 362 F. 2d 594, 599-600 (8th Cir., 1966); *United States v. Caruso*, 358 F. 2d 184 (2d Cir., 1966); *Leek v. State of Maryland*, 353 F. 2d 526 (4th Cir., 1965); *Whalem v. United States*, 346 F. 2d 812 (D.C. Cir., 1965), cert. den. 382 U.S. 862, 15 L. Ed. 2d 100 (1965); *Robinson v. United States*, 283 F. 2d 508 (D.C. Cir., 1960), cert. den. 384 U.S. 919, 5 L. Ed. 2d 259 (1960).

Even if clothing is found in the search of a premises rather than the search of a person, if the court is willing to stretch the point far enough to call the clothing means or instruments of committing the crime, the clothing is seizable and is admissible.⁵³ Some federal courts allow the seizure and use in evidence of clothing under factual situations similar to the instant situation without engaging in the fiction of extending the normal concept of what is a means or instrument of committing a crime.⁵⁴

Even where documentary evidence is involved, the same illogical distinction is made in some cases, since documentary evidence may be seized if found on the person.⁵⁵ Documentary evidence also may be seized in a search of the premises and used in evidence if it can be classed as means, fruits or contraband.⁵⁶

If the majority below had believed as did the dissent that the clothing had been used as a disguise, the majority would have held that the clothing was subject to seizure

⁵³ E.g., *United States v. Guido*, 251 F. 2d 1, 3 (7th Cir., 1958), cert. den. 356 U.S. 950, 2 L. Ed. 2d 843 (1958) where the shoes worn at the time the crime was committed were held to be implements or means of committing the crime and, therefore, subject to seizure. The entire confusing area of when an item is an instrumentality and when the same item is not an instrumentality is discussed in the next section of this Brief.

⁵⁴ E.g., *Trotter v. Stevens*, 241 F. Supp. 33, 40-41 (E.D. Ark., 1965), aff'd 361 F. 2d 888 (8th Cir., 1966). In that case articles of clothing in the possession of accused rapists and not being worn by them were held to be seizable. The "Rule" was not mentioned.

⁵⁵ *United States v. Kirschenblatt*, 16 F. 2d 202-203 (2nd Cir., 1926).

⁵⁶ *Abel v. United States*, 362 U.S. 217, 4 L. Ed. 2d 668, rehearing denied 362 U.S. 984, 4 L. Ed. 2d 1019 (1960); *United States v. Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653 (1950); *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947); *Zap v. United States*, 328 U.S. 624, 90 L. Ed. 1477 (1946); *Marron v. United States*, 275 U.S. 192, 72 L. Ed. 231 (1927). See also the next section of this Brief.

as being a means of committing a crime (R. 139, 147-148).^{56a} Since there was no objection to the introduction of the clothing into evidence at the trial, there was never any need at the trial to show that the particular clothing in the instant case was used as a disguise. However, the fact that Mr. Hayden wore something like a uniform in the course of a robbery on the premises of a cab company, and that he wore a cap, suggests that Mr. Hayden at least selected his attire for the robbery with some thought of avoiding detection. Therefore, the statement in the majority Opinion at R. 139 that there is no contention that the clothing was used as a disguise is unfair since it was never an issue raised at any factual hearing which would have given the State the opportunity to produce evidence that the clothing was used as a disguise. None of the witnesses were able to see enough of Mr. Hayden to positively identify him and this also suggests that the clothing was effective as a disguise.

Even though none of the witnesses actually saw the gun, it was seizable; and yet, all of the witnesses saw and were able to identify the clothing, and the majority below held it was not seizable in a reasonable search. It is apparent that any reasonable man in the position of the officer here would have felt it his duty to seize the clothing, which fit the description of what the robber was wearing and bore evidence that it was discarded in haste. It would place an unreasonable burden upon an officer, without any apparent justification for placing the officer on the horns of a dilemma, to require him in an emergency situation, such as the one in the instant case, to attempt to determine whether an item he knows is relevant can be classed as means,

^{56a} In *United States v. Guido*, 251 F. 2d 1, 3-4 (7th Cir., 1958), cert. den. 356 U.S. 950, 2 L. Ed. 2d 843 (1958), the Court recognized the difficulty in distinguishing between a mask and a hat which may have been pulled down upon the face of a robber.

fruits or contraband. Placing the officer on the horns of such a dilemma does not protect either the privacy or dignity of those suspected or accused of crime and will continue to confuse and confound law enforcement officers, attorneys representing persons accused of crimes, and the courts.

Using the authorities cited above to determine when certain items are seizable and when they are not, the State has constructed a hypothetical situation which illustrates how artificial and illogical the result under the "Rule" can be. The hypothetical situation varies the instant factual situation somewhat in order to present a complete picture:

A rapes B at knife point while wearing a Batman mask and takes \$50.00 from her purse. Other than the Batman mask, A is dressed in normal street clothes. B screams and the police arrive at the scene. A runs off and B points to A and says, "That masked man raped me at knife point and robbed me." The police follow A and A runs into a house. A takes off his pants and the mask and is about to take off his shirt when the police knock at the door and are admitted by A's wife. Before the police enter the room, A throws the pants with the \$50.00 in the pocket and the knife and the mask under a chair near the entrance to the room. When the police enter the room, A is sitting on the chair, clad in his shirt and underwear, reading a newspaper. The police observe the pants and the knife under the chair. The officers can see that the pants are semen stained and also contain blood stains. They therefore arrest A and take the knife, the pants and the shirt. When they pick up the pants they see the mask and also seize the mask. They find the \$50.00 in the pocket of the pants. Subsequent laboratory analysis identifies the blood stains on the pants as the same type as the blood of B. A is required by the police to submit the withdrawal of his blood by a

physician to determine his blood type. His type differs from the type found on his pants.

B is interviewed after the arrest and says her assailant had an emission during the rape. If the "Rule" is applied, as the cases which feel constrained to follow the "Rule", state that the "Rule" must be applied, the police properly seized the knife, the mask, the shirt, and the money found in the pocket of the pants,⁵⁷ but they improperly seized the pants. It was also proper to require the blood test. With regard to the rape, the pants are the most vital item of evidence of all the items found under the chair. The shirt proves nothing as to the rape; the money has nothing to do with the rape; and anyone may own a knife or a Batman mask (especially if one has young children). The pants are evidence that there had been an emission, which corroborates B's story, and also contained blood of the same type as B. Both factors may help substantiate any testimony of B as to penetration. A's blood test is meaningless without the use of the pants.

The "Rule" in such situations just "creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant."⁵⁸ It is impossible to conceive that an amendment to the Constitution which asks for reasonableness, requires such an unreasonable, ludicrous and tragic result.

F. THE "RULE" CAUSES MUCH CONFUSION AND INCONSISTENCY.

The one area which has caused the most confusion and inconsistency in the application of the "Rule" is the determination of what items are means or instrumentalities of

⁵⁷ If the money taken by Hayden was found in the pocket of his pants which the officer found in the washing machine, the majority below would have allowed the seizure of the money but still would not have allowed the seizure of the pants.

⁵⁸ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 109 (1966).

committing a crime.⁵⁹ This Court itself has had great difficulty in deciding when a particular item is an instrumentality and when it is not.

In *Marron v. United States*, 275 U.S. 192, 72 L. Ed. 231 (1927) this Court found that ledgers and bills for gas, electric light, water and telephone service were the instrumentalities of the operation of an illegal liquor business. However, in *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877 (1932), this Court found similar bills, ledgers and an address book not to be instrumentalities of an illegal liquor business. This Court has recognized that the cases "in this Court cannot be satisfactorily reconciled."⁶⁰

The lower federal courts have exhibited the same confusion and inconsistency in determining when an item is and when it is not an instrumentality of the crime.⁶¹ This confusion and inconsistency have caused the author of a Note which generally approved the "Rule" to state:

"Thus, more than 30 years after *Marron*, practicing attorneys and others alike, are without clear Supreme Court pronouncement. In the main, the question has been silently delegated to the circuit and district courts for development and embellishment. This has led to the

⁵⁹ Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 609. Shellow "The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence", 48 Marq. L. Rev. 172, 175.

⁶⁰ *Abel v. United States*, 362 U.S. 217, 235-238, 4 L. Ed. 2d 668, 684-685, rehearing den. 362 U.S. 984, 4 L. Ed. 2d 1019 (1960). In *Abel* this Court held that a birth certificate was an instrumentality of the crime of espionage because it could be used to pose as an American citizen. See also Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 611.

⁶¹ Shellow, "The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence", 48 Marq. L. Rev. 172, 176-179. Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 609-611.

growth of several different approaches, often producing contradictory and irreconcilable results.⁶²

In the case of *United States v. Guido*, 251 F. 2d 1, 3-4 (7th Cir. 1958) cert. den. 356 U.S. 950, 2 L. Ed. 2d 843 (1958), the 7th Circuit held that the shoes worn during a robbery were part of the means of committing the crime. The majority Opinion below in discussing *Guido* stated:

"Judges, aware of the practical problems faced by police officers and prosecutors in the performance of their duties, have sometimes strained mightily to overcome the exclusionary effect of the mere evidence rule by stretching to the point of distortion the category of 'instrumentalities of crime,' in order to achieve the admission in evidence of articles manifestly of evidential value only . . . While the result in a particular case may not be unreasonable, it can hardly be squared with the pronouncements of the Supreme Court." (R. 144).

The dissenting Opinion below presented very cogent reasoning why the result achieved in *Guido* was more reasonable under the circumstances than the result achieved by the majority Opinion in this case (R. 148). But reasonable men should not have to "strain mightily" and use "distortion" to evade or avoid the "Rule". A "Rule" which requires reasonable men to do this is itself unreasonable and should be, as the entire Court below suggests, re-examined and re-interpreted (R. 144, 150).

The State courts also have had considerable difficulty in determining what is and what is not an instrumentality of committing a crime. In *State v. Chinn*, 231 Ore. 259, 373 P. 2d 392 (1962) a camera, soiled bed sheets and empty beer

⁶² Note, "Evidentiary Searches: The Rule and the Reason", 54 Geo. L.J. 593, 611. See also Comment, "Limitations on the Seizure of 'Evidentiary Objects' — A Rule in Search of a Reason", 20 U. Chi. L. Rev. 319, 322.

bottles were held to be the means of committing statutory rape.⁶³ In the case of *Schweinefuss v. Commonwealth*, 395 S.W. 2d 370, 375-376 (Ky. 1965) the Court held that "washing pans and utensils, mouth wash, vaseline, towels, cards used by the prostitutes, money bags, and prophylactic contraceptive devices" were implements of committing prostitution and were, therefore, subject to seizure under a search warrant.

It is, therefore, apparent that if a court is willing to define instrumentality broadly enough it can avoid the "Rule". This results in unequal treatment afforded to persons accused of crimes. A "Rule" which encourages such unequal treatment promotes injustice rather than justice. However, some apologists for the "Rule" even suggest that such distortion and deception be expanded in order to help save the "Rule". In a Comment which seems to favor retention of the "Rule", the author suggests:

"By broadly defining 'instrumentality' courts can admit evidence despite any formal requirements of the doctrine, while at the same time can leave open the door to the protection of privacy."⁶⁴

The State contends that if even advocates of the "Rule" boldly suggest that the courts use such artificial means to avoid the "Rule", then the "Rule" itself is illogical or at least has outlived its usefulness.

⁶³ At the time of the decision in *State v. Chinn*, Oregon had a statute which was similar to Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 41(b), and apparently stretched the normal concept of what would be instrumentality in order to avoid the "Rule". It is interesting to note that shortly after the decision in *State v. Chinn*, Oregon amended its statute to specifically authorize the issuance of a search warrant to seize evidence of crime. See Comment, "Search and Seizure of 'Mere Evidence' — Amendment to Or. Rev. Stat. Sec. 141.010 — Effect on Prior Law and Constitutionality", 43 Ore. L. Rev. 333 (1964).

⁶⁴ Comment, "The Fourth and Fifth Amendments — Dimensions of an 'Intimate Relationship'", 13 U.C.L.A. L. Rev. 857, 861.

The dissenting Opinion in the instant case points out that while clothing might not be considered an instrumentality of the crime in all cases, under the facts here, the clothing should have been considered an instrumentality of committing the crime (R. 147-148). In the instant case Mr. Hayden disrobed immediately upon entering the house in order to avoid detection. He was relying on his near nakedness to establish the fact that he could not have committed the crime. The officers should have been allowed to testify that the clothing was found in such a condition that it showed that it was hastily discarded in order to overcome Mr. Hayden's reliance on his near nakedness. If the police could testify about the condition in which they found the clothing they should have been allowed to introduce the clothing in evidence. Such use of the clothing in evidence subjected Mr. Hayden to no further burden or indignity.

The State has contended that the clothing here was used by Mr. Hayden as a disguise and was an instrumentality of crime. Where a "Rule" requires such a difference in result based upon a fine distinction as to whether clothing was or was not used as a disguise, there is obviously reason to be suspicious of its validity and wisdom.

The Supreme Court of California points out that the "Rule" has been distinguished to the point of extinction by the instrumentality exception.⁶⁵ Both the Supreme Court of California and the Supreme Court of New Jersey question how an officer can determine whether an item is an instrumentality or not, since the determination of whether or not it is an instrumentality should be made at the trial.⁶⁶

⁶⁵ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 112.

⁶⁶ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 111; *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 187.

It has been suggested that the reason why instrumentalities may be taken is "an expansion of the ancient concept of deodand", whereby anything used in the commission of a crime is forfeited to the state.⁶⁷ Such an ancient concept really has no validity in modern times. In addition, it would appear that utilization of the deodand concept would authorize the seizure of the clothing here, because it was used during the commission of a crime and should be forfeited to the State.

The "Rule" thus creates confusion and causes injustice. One man may be convicted because his clothing was technically considered to be an instrumentality of a crime and another man may be acquitted because the police are not allowed to introduce his clothing as an instrumentality of committing a crime. Therefore, the "Rule" should be abandoned unless it serves some useful purpose. In the next section of this Brief the State will contend that the "Rule" does not even accomplish the purpose its apologists attribute to it.

G. THE "RULE" DOES NOT ACCOMPLISH ANY LEGITIMATE PURPOSE.

Most apologists for the "Rule" quote the last paragraph of an Opinion by Learned Hand in the case of *United States v. Poller*, 43 F. 2d 911, 914 (2d Cir., 1930) to justify application of the "Rule". In this paragraph, this distinguished jurist recognized that there is no "sound policy" for the "Rule", but at the time he wrote the Opinion in 1930, he thought the "Rule" might have an effect which apparently it has not accomplished. The full quotation is set forth below:

"In conclusion it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search

⁶⁷ *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 187.

itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. *If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does.* Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime. The remedy may not be very extensive, but it is something, and it is all that can be given, as we understand the present decisions. *A man is certainly subject to some search of his premises upon his arrest; if it would have been better to allow nothing without warrant but a search of his person, it is too late to hold so now.*" (Emphasis supplied).

The apologists for the "Rule" do not discuss the portions of the quotation above which the State has emphasized.

Even in 1930 Judge Hand recognized that the "Rule" could do very little in limiting the quest. Subsequent events have shown that the "Rule" is totally ineffective to limit the quest. It is generally recognized that preventing the seizure of relevant evidence which cannot technically be classed as means, fruits or contraband has not limited the quest.⁶⁸ In any event, such a reason for the "Rule" is at best artificial. If it is desired to limit exploratory searches or to prevent the invasion of privacy, then this should be done directly rather than by artificial and ineffective means.⁶⁹ It is not possible to prevent exploratory

⁶⁸ Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 367-368, 370; See also, Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law", 49 Calif. L. Rev. 474, 478-479 (1961).

⁶⁹ See Kaplan, "Search and Seizure: A No-Man's Land in the Criminal Law", 49 Calif. L. Rev. 474, 478-479, 492-493.

searches or the invasion of privacy by saying to law enforcement officials that you may search for and seize A, B and C, but you cannot in the same search seize D. In a case where A, B, C and D are all relevant evidential items that may be destroyed or removed if not seized, and when the whole purpose of any search is to seize relevant evidential items before they can be destroyed or removed, there is no basis for distinction among A, B, C and D. Under the facts of the instant case the "Rule" prevented the use of vital evidence which was found in a search which was not exploratory and in which there was no further invasion of privacy than was necessary to allow the officers to search for the means of committing the crime and the fruits of the crime.

One need only read this Court's Opinion in the case of *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947) to realize that the "Rule" does absolutely nothing to limit the quest, prevent the invasion of privacy, or to limit exploratory searches. The majority Opinion below recognized that this Court in *Harris* tolerated an "intensive five hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest" (R. 137). In the course of the search, the officers discovered contraband which was totally unrelated to the crime for which the defendant was arrested and yet the search and seizure were held to be valid merely because contraband unrelated to the cause for the arrest was found. Under the "Rule", if the officers in *Harris*, during the first ten minutes of that search, had uncovered vital evidence of the crime for which Harris was being arrested in the very room in which Harris was arrested, the seizure of that evidence would be held to be unreasonable, if the evidence could not technically be classed as means, fruits or contraband.

The Supreme Court of California recognized that the "Rule" does not limit the quest and does not protect privacy. The Court said:

"The rule does not prevent exploratory searches at all; it prohibits the seizure of mere evidence in the course of any search, reasonable or unreasonable, specific or general."⁷⁰

Another indication that the prevention of invasion of privacy does not underlie the "Rule" is the fact the "Rule" has not been applied to the wire tapping, eavesdropping situation, and the results of any wire tapping or eavesdropping can under no circumstances be considered to be means, fruits or contraband.⁷¹

Whether or not there may have been some justification for the "Rule" in the past, it is obvious that there is no justification for the "Rule" today. Any purposes the "Rule" can legitimately seek to accomplish can be much better accomplished by other more direct means. When a "Rule" fails to fulfill any purpose properly ascribed to it, and at the same time causes confusion, inconsistency and injustice, that "Rule" must be abandoned.

II.

Experienced Trial Counsel, As Part of Trial Tactics, May Waive the Accused's Right To Object To The Introduction Into Evidence of Certain Items Seized.

A. MARYLAND HAS LONG HAD A PROCEDURAL RULE REQUIRING CONTEMPORANEOUS OBJECTION TO THE ADMISSIBILITY OF EVIDENCE AND THE RULE SERVES A LEGITIMATE STATE INTEREST.

Maryland law has for some time contained specific provisions requiring contemporaneous objection to objection-

⁷⁰ *People v. Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108, 110.

⁷¹ Comment, "Eavesdropping Orders and the Fourth Amendment", 66 Colum. L. Rev. 355, 369-370. Footnotes 91, 92, 93, 94.

able testimony and exhibits in order to preserve one's rights. At the present time Rule 522 d 2 of the Maryland Rules of Procedure reads as follows:

"Every objection to the admissibility of evidence shall be made at the time when such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become apparent, otherwise the objection shall be treated as waived." (Emphasis supplied.)

Rule 885 of the Maryland Rules of Procedure reads as follows:

"This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court." (Emphasis supplied.)

The above Rules have been consistently applied by the Court of Appeals of Maryland to deny relief on the grounds of waiver where a proper objection or a proper presentation of a question was not made in the trial court. E.g., *Hewitt v. State*, 242 Md. 111, 113-114, 218 A. 2d 19, 20-21 (1966); *Capparella v. State*, 235 Md. 204, 209, 201 A. 2d 362, 365 (1964); *Jenkins v. State*, 232 Md. 529, 532-533, 194 A. 2d 618, 620-621 (1963).

In *Jenkins* the Court of Appeals of Maryland specifically dealt with the failure to object to the use of evidence obtained in an illegal search and seizure. The Court pointed out that the trial in *Jenkins* took place on December 17, 1962, and that the decision in *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961) was handed down on June 19, 1961. The Court held, citing many previous cases, that under Rule 522 d 2 of the Maryland Rules of Procedure "a party waives his right by not objecting to the evidence at the time it was offered." The Court further held that the defendant was charged with knowledge of the *Mapp* case and the state procedural requirement was still effective after *Mapp*.

In the *Hewitt* case, the Court of Appeals of Maryland said:

"We have repeatedly held and attempted to make clear that Maryland Rule 885 has useful and sound objectives. One of its purposes is to prevent the trial of cases in a piecemeal fashion, thereby saving time and expense and accelerating the termination of litigation. Since no questions concerning double jeopardy or denial of due process were raised below, we hold that these questions are not properly before us."⁷²

In the case of *Henry v. Mississippi*, 379 U.S. 443, 448, 13 L. Ed. 2d 408, 413 (1965), this Court recognized that a rule requiring contemporaneous objection does serve a legitimate state interest, when this Court said:

"The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded

⁷² *Hewitt v. State*, 242 Md. 111, 113-114, 218 A. 2d 19, 20-21 (1966).

from jury consideration, and a reversal and new trial avoided."

The facts in this case show that the State has a valid interest in setting up such rules and in requiring that they be followed. If Mr. Hayden's counsel had objected at the time of trial to the introduction of clothing, if there was error it could have been corrected. Perhaps under such circumstances, even if the prosecutor felt the evidence was admissible, he might have withdrawn it, if he felt he had sufficient other evidence, rather than risk reversal on appeal.

By not objecting, Mr. Hayden deprived both the court and the State of their right to decide not to use the evidence. In addition, as we have indicated in a previous section of this Brief, there is a strong possibility that the clothing was used in such a manner that it was a disguise, which would be an instrumentality of committing a crime. Since Mr. Hayden did not object at all to the introduction of the clothing in evidence, the State did not have the opportunity to attempt to show that the clothing was used as a disguise.

The refusal to consider waiver in this case is particularly inappropriate, since it is the State's contention that the failure to object in this case was an important part of the trial tactics of Hayden's experienced trial attorney.

B. THE COURT BELOW INCORRECTLY FOUND THAT THE COURT OF APPEALS OF MARYLAND DID NOT APPLY ITS CONTEMPORANEOUS OBJECTION RULE IN THIS CASE.

In the majority Opinion below, it was stated that:

"It is unnecessary in this case to reach the question of whether Hayden voluntarily relinquished his constitutional claim, for in the state post-conviction proceedings the Court of Appeals of Maryland did not

look upon the failure to object as a bar to his constitutional claim. Instead it remanded the case to the lower court for a determination of the legality of the search and seizure. *Hayden v. Warden, Maryland Penitentiary*, 233 Md. 613, 195 A. 2d 692 (1963)" (R. 135).

The majority Opinion, however, failed to consider the manner in which the case first reached the Court of Appeals of Maryland, and failed to relate that factual situation to what the Court of Appeals of Maryland said. Mr. Hayden's trial took place on May 21, 22 and 28, 1962 (R. 92) and Mr. Hayden did not take a direct appeal from his conviction (R. 41). Therefore, the Court of Appeals of Maryland at the time it considered Mr. Hayden's Application for Leave to Appeal under the Post Conviction Procedure Act, did not have a transcript of Mr. Hayden's trial.

Since the post conviction judge had disposed of all Mr. Hayden's contentions after a hearing at which no testimony was taken, the Court of Appeals of Maryland had nothing whatever before it which would have shown exactly what took place at the trial. Therefore, the Court of Appeals of Maryland was faced with a situation where they could not be sure as to just what did happen with regard to a contemporaneous objection at the time of trial. They were also faced with the fact that in his Application for Relief under the Post Conviction Procedure Act, Mr. Hayden had indicated his dissatisfaction with the services of his attorney at trial (R. 25). Under such a situation the Court of Appeals of Maryland could not even reach the question of whether or not Rule 522 d 2 of the Maryland Rules of Procedure had been adequately complied with at the trial, without having the post conviction judge take testimony and determine the facts. The case of *Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770 (1963) had been recently decided and the Court of Appeals of Maryland was aware

that in a federal habeas corpus proceeding the federal court could only accept a state court finding if an adequate evidentiary hearing had been held. Since there was no transcript of the trial available to the Court of Appeals of Maryland, and since there had been no testimony at the post conviction hearing, the Court of Appeals of Maryland realized that the *Townsend v. Sain* test had not been met.

The exact language of the Court in remanding the case to the post conviction judge indicates that the Court of Appeals of Maryland felt limited by the fact that it did not know what actually had happened at the trial. The Court said:

"Instead of ascertaining whether in fact there had been an illegal search and seizure, and a consequent arrest without a warrant, the hearing judge summarily disposed of the matter by stating that the question should have been raised at the trial and was not a ground for post conviction relief. *In so doing he may have gone too far.* See *Edwards v. Warden*, 232 Md. 667 and *Davis v. Warden*, 232 Md. 670. We think the question should first have been considered as one of fact rather than a question of law." (Emphasis supplied.)⁷³

By just saying that the post conviction judge "may have gone too far" and remanding to the post conviction judge for a determination of the facts and a decision on whether or not he had gone too far, the Court of Appeals of Maryland did not refuse to apply the contemporaneous objection rule. The Court merely desired that a *Townsend v. Sain*, type hearing be held to determine factually whether or not the contemporaneous objection rule was applicable.

⁷³ *Hayden v. Warden of the Maryland Penitentiary*, 233 Md. 613, 614, 195 A. 2d 692 (1963).

It is also interesting to note that the two cases cited by the Court of Appeals of Maryland⁷⁴ were cases in which the trial had taken place before this Court's decision in the case of *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961). The Court remanded in each case since it was obvious that a contemporaneous objection would have been unavailing, if made, since Maryland did not apply the exclusionary rule to evidence illegally seized prior to the decision in *Mapp*. In these two cases the Court of Appeals of Maryland was merely recognizing that counsel should not be required to make an objection if under the law as it exists, the objection cannot be sustained. Such a failure to make a needless objection would not necessarily bar raising the point after the law is changed. Since the Court of Appeals of Maryland did not have a transcript of Mr. Hayden's trial, the Court may have mistakenly believed that Mr. Hayden's case had also been a pre-*Mapp* trial.

After the case had been remanded and a hearing held, Mr. Hayden filed a second Application for Leave to Appeal which he later withdrew (R. 43). Therefore, the Court of Appeals of Maryland never had the opportunity to consider whether or not the contemporaneous objection rule was applicable under the facts.

Now that the transcript of the original trial is available (R. 92-127) and there has been a full hearing in the District Court, it is clear that Mr. Hayden's counsel did not object to the introduction of the clothing in evidence. There was a failure to comply with Rule 522 d 2 of the Maryland Rules of Procedure and Mr. Hayden thereby waived his right to object.

⁷⁴ *Edwards v. Warden*, 232 Md. 667, 195 A. 2d 40 (1963); *Davis v. Warden*, 232 Md. 670, 195 A. 2d 37 (1963).

C. THERE WERE NO EXCEPTIONAL CIRCUMSTANCES HERE
WHICH EXCUSED COMPLIANCE WITH THE CONTEM-
PORANEOUS OBJECTION REQUIREMENT.

In the case of *Henry v. Mississippi*, 379 U.S. 443, 451-452, 13 L. Ed. 2d 408, 415 (1965), this Court indicated that counsel's trial strategy could waive an accused's rights to assert constitutional claims, unless the circumstances are exceptional enough to overcome waiver. This Court said:

"If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus v. Balkcom*, 333 F. 2d 496 (CA 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case."

The above quotation appears to clarify this Court's decision in the case of *Fay v. Noia*, 372 U.S. 391, 426, 439, 9 L. Ed. 2d 837, 861, 869 (1963). In *Fay v. Noia*, this Court recognized that exceptional circumstances could prevent waiver and said that counsel's decision, not participated in by an accused, does not automatically bar relief. However, when there are no exceptional circumstances, and when the choice made by counsel is logically his to make, then both *Fay v. Noia* and *Henry v. Mississippi* recognize that the choice by counsel could constitute waiver.

The State contends that there were no exceptional circumstances here which excused the failure to object and in fact the failure to object was an important part of the

trial tactics. The United States District Court for the District of Maryland, after a full hearing, determined that Mr. Hayden received adequate representation and said, at R. 45:

"Hayden was represented at his trial by counsel of his own choosing, widely experienced in criminal cases, who exercised his best judgment as to how the case should be tried. Hayden made no objection to his counsel or to the Court at the time, and may well be held to have waived any objections to matters of strategy and tactics. In any event, his representation by his trial counsel was not so inadequate as to amount to a denial of Hayden's constitutional rights." (Emphasis supplied).

This finding by the District Court was not contested on appeal.

In the court below the State contended that Mr. Hayden's counsel at trial had two strategic reasons for not objecting to the admission of the clothing into evidence. The main strategic reason for not objecting is that Mr. Hayden's counsel intended to rely on mistaken identity (R. 89). In his attempt to establish that the witnesses, who could not specifically identify Mr. Hayden, had the wrong man, he cross-examined the State witnesses quite extensively as to the exact color of the clothing (R. 96, 113-114). The trial counsel's attempt to test the ability of the witnesses to distinguish colors could not have been as effective without utilization of the clothing.

While Mr. Hayden's counsel did not so state in the United States District Court for the District of Maryland, it seems apparent from the record that his strategy included another string to his bow, which required allowing the clothing to be introduced into evidence. He knew that though approximately \$363.00 had been taken, and the police had arrived at Mr. Hayden's home within minutes

of the robbery, the money had not been found. It is apparent from the record that Mr. Hayden's counsel attempted to rely on the fact that after a painstaking search in such close proximity to the time of the crime, the money had not been found. He apparently hoped to create a reasonable doubt in the mind of the trier of fact.

The introduction of the various items found in the search, including the clothing, helped to establish how thorough the search had been. The trial counsel's strategy came very close to being effective since the trial judge indicated that the only missing link in the case was the fact that the money had not been found (R. 126-127). Mr. Hayden commented on this in the District Court (R. 71).

In a footnote, the majority Opinion speculated that if Mr. Hayden's trial counsel desired to show the thoroughness of the search which did not find the money he could have done so without allowing the clothing to be introduced in evidence (R. 134). However, the case of *Henry v. Mississippi*, 379 U.S. 443, 451, 13 L. Ed. 2d 408, 415, showed that trial counsel does not have to use unassailable strategy in order for there to be a waiver binding on an accused. In any event, the speculation in the majority Opinion uses hindsight to test trial tactics after there has been a conviction. If trial counsel had won an acquittal by his strategy, no one could have used hindsight to review his strategy. The *Henry* case recognizes that trial strategy is trial strategy even if it backfires.

In the *Henry* case itself this Court recognized that even strategy which backfired could bind the accused. This Court, therefore, remanded the case to the Mississippi Supreme Court in order to determine not whether counsel had consulted with the accused but whether counsel had actually failed to object as part of trial strategy. The result

is somewhat surprising since counsel in *Henry* must have recognized that he made a mistake in not objecting because he did move for a directed verdict at the close of the State's evidence and assigned as one ground, use of illegally obtained evidence. This Court pointed out that the objection at the time of the motion for a directed verdict may have accomplished the legitimate purpose of the contemporaneous objection rule. In the instant case, trial counsel did not at any time seek to change his decision not to object and never felt that the decision was a mistake. Further, since there was no objection at any time, there can be no contention that the purpose of the contemporaneous objection rule was even partially served.

The State still contends that in view of the strength of the case against Mr. Hayden, it was quite logical for his counsel to adopt the strategy with regard to showing that a thorough search did not produce the money. The majority Opinion does not in any way comment on trial counsel's main and expressed reason for not objecting. There is no effective way that counsel could have attempted to test the ability of the witnesses to determine exact colors other than by using the clothing.

Unless counsel is incompetent, an appellate court should not comment on trial strategy. The review of the entire file at leisure away from the heat of a trial is far different from making an almost instantaneous decision as to whether or not to object. If appellate courts make a practice of utilizing hindsight to criticize trial tactics of attorneys who do not gain acquittals for their clients, then defense counsel will be tempted to try every case by the book rather than try a novel approach to strategy which may represent the only chance of success in a case that is stacked against the accused. To encourage only sterile and

unimaginative defense counsel will not protect the rights of persons accused.

Many federal cases decided after this Court's decision in *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965) have recognized that decisions made by counsel as part of trial strategy may constitute a waiver binding on an accused, unless the circumstances are so exceptional that it is necessary to excuse the accused from the effect of waiver. In *Wilson v. Gray*, 345 F. 2d 282, 288-289 (9th Cir., 1965) and *Rhay v. Browder*, 342 F. 2d 345, 348-349 (9th Cir., 1965) the United States Court of Appeals for the Ninth Circuit points out that one of the most important rights that an accused has is the right to counsel, and that many of the decisions which must be made during the course of a trial must be made by counsel if an accused is to be adequately represented. Therefore, in both cases it was held that where counsel has made a decision as part of trial strategy, it is binding upon the accused, and can effectively waive the accused's rights to litigate a constitutional claim. In *Rhay v. Browder*, 342 F. 2d 345, 349 (9th Cir., 1965) it was stated:

"And we think that it inevitably flows from them that, when a defendant has counsel, as Browder did, it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there."⁷⁵

In the case of *Nelson v. People of the State of California*, 346 F. 2d 73, 78-79 (9th Cir., 1965) the court held that the

⁷⁵ See also *Campbell v. United States*, 355 F. 2d 394, 396 (7th Cir., 1966); *Henderson v. Heinze*, 349 F. 2d 67, 69 (9th Cir., 1965); *Mirra v. United States*, 255 F. Supp. 570, 575 (S.D. N.Y., 1966).

decision by counsel in the state court not to raise certain constitutional questions was binding upon the accused, and constituted a "deliberate bypass" even though counsel's decision was objected to by the accused at the time. The court recognized that this Court's decision in *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408 (1965) did place certain limitations on certain very broad language in the case of *Fay v. Noia*, 372 U.S. 391, 439, 9 L. Ed. 2d 837, 869 (1963).⁷⁶

The Court in *Nelson* considered the relationship between counsel and accused at a trial and stated, at page 81:

"Does the fact that here there was prior consultation with the accused, and that he disagreed with counsel's strategy, make a legal difference? This question has not been before the Supreme Court. Our view is that the result should be the same. Our reasons are that only counsel is competent to make such a decision, that counsel must be the manager of the law-suit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel . . . One of the surest ways for counsel to lose a law-suit is to permit his client to run the trial. We think that few competent counsel would accept retainers, or appointment under the Criminal Justice Act of 1964, to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right." (Footnotes and citations omitted.)

There was, of course, no claim of bad faith in the instant case. The United States District Court for the District of Maryland found that counsel was competent and this finding was not disputed on appeal (R. 45). It was, therefore,

⁷⁶ *Nelson v. People of the State of California*, 346 F. 2d 73, 79 (9th Cir., 1965).

apparent that there were no exceptional circumstances which would excuse the failure to make a contemporaneous objection and, therefore, the failure to object should have been held to constitute a waiver by Mr. Hayden.

This Court, as recently as the case of *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908, 916-917, footnote 9, has recognized that the failure to object at trial did waive the accused's right to raise certain constitutional claims arising out of a prosecutor's comments that he had refused to submit to a "breathalyzer" test. This Court did not find it necessary to send the case back to the state court to determine whether or not there had been a knowing waiver. This Court apparently assumed that the failure to object without the showing of any exceptional circumstances did constitute waiver.

CONCLUSION

For all the reasons hereinabove stated, the State of Maryland respectfully submits that the judgment below should be reversed, and the decision of the United States District Court for the District of Maryland, denying the relief prayed in the Petition for a Writ of Habeas Corpus should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTES AND RULES INVOLVED

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 41. Search and Seizure.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957.

ANNOTATED CODE OF MARYLAND (1966 Cumulative Supplement)

Article 27. Crimes and Punishments
Search Warrants

§ 551. Issuance; contents; time of search, etc.; disposition of property seized.

Whenever it be made to appear to any judge of the Supreme Bench of Baltimore City, or to any judge of any of the circuit courts in the counties of this State, or to any justice of the peace in this State, by a written application signed and sworn to by the applicant, accompanied by an affidavit or affidavits containing facts within the personal knowledge of the affiant or affiants, that there is probable cause, the basis of which shall be set forth in said affidavit or affidavits, to believe that any misdemeanor or felony is being committed by any individual or in any building, apartment, premises, place or thing within the territorial jurisdiction of such judge or justice of the peace, or that any property subject to seizure under the criminal laws of the State is situated or located on the person of any such individual or in or on any such building, apartment, prem-

ises, place or thing, then such judge or justice of the peace may forthwith issue a search warrant directed to any duly constituted policeman, constable or police officer authorizing him to search such suspected individual, building, apartment, premises, place or thing, and to seize any property found liable to seizure under the criminal laws of this State, provided that any such search warrant shall name or describe, with reasonable particularity, the individual, building, apartment, premise, place or thing to be searched, the grounds for such search and the name of the applicant on whose written application as aforesaid the warrant was issued, and provided further that any search or seizure under the authority of such search warrant, shall be made within fifteen (15) calendar days from the date of the issuance thereof and after the expiration of said fifteen (15) day period said warrant shall be null and void. If, at any time, on application to a judge of the circuit court of any county or of the Criminal Court of Baltimore City, it appears that the property taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, or that the property was taken under a warrant issued more than fifteen (15) calendar days prior to the seizure, said judge must cause it to be restored to the person from whom it was taken; but if it appears that the property taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then said judge shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law.

MARYLAND RULES OF PROCEDURE

Rule 522. Objections to Ruling or Order — Method of Making — Gen'l.

d. Objection to Evidence.

2. Time to Be Made — Waiver.

Every objection to the admissibility of evidence shall be made at the time when such evidence is offered,

or as soon thereafter as the objection to its admissibility shall have become apparent, otherwise the objection shall be treated as waived.

Rule 885. Scope of Review. — Limited to Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

WARDEN, MARYLAND PENITENTIARY, PETITIONER

v.

BENNIE JOE HAYDEN

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a cap, jacket, and trousers worn by the respondent while executing an armed robbery were properly seized by police officers in the course of a search incidental to respondent's arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTEREST OF THE UNITED STATES

This case presents a question of importance to federal, as well as State, law enforcement—i.e., whether the Constitution prohibits the seizure by government

agents of property which is "of evidential value only" and which is found in the course of an otherwise lawful search. The court below held that the Fourth Amendment, as interpreted and applied by this Court, permits seizure in such circumstances only if the property seized is contraband, if its possession is illegal, if it is an instrumentality by which the offense was committed or if it is the "fruit" of the offense (R. 139). We do not believe that the language of the Amendment, its history or its policy justify a limitation of this kind.

We recognize, of course, that Rule 41(b) of the Federal Rules of Criminal Procedure presently authorizes the issuance of search warrants only for the search and seizure of fruits or instrumentalities of crime. But federal officers must often conduct searches incidental to arrest, searches of moving vehicles, or border searches. In so doing, or, indeed, in the course of a lawful search under a warrant, they may find property which is neither an instrumentality of an offense nor the fruit thereof, but which is nonetheless of substantial evidentiary value. Whether they may seize and retain such property for use in a criminal trial is affected by this Court's resolution of the question presented in this case.

Moreover, it is obviously important for purposes of the future application and the possible revision of Rule 41(b) to ascertain whether the present limitations of the Rule are constitutionally required. The draftsmen of Rule 41(b) recognized that they were merely restating statutory provisions enacted in the Espionage Act of 1917, 40 Stat. 226. See Reviser's

Note to Rule 41(b), F.R. Crim. P. That statute was enacted without any suggestion that it incorporated constitutional standards. The decision of the court below holds, in effect, that Rule 41(b) could not constitutionally be extended to authorize search warrants for property which is purely evidentiary.

STATEMENT

About 8:00 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland and took some \$363.00 (R. 38, 92-93, 132). Two cab drivers in the vicinity followed the man from the scene. One of the drivers notified the company dispatcher by radio that the robber—a Negro about 5'8" tall, wearing a light cap and a dark jacket, similar to a truck driver's uniform—had entered a house at 2111 Cocoa Lane (R. 38-39, 97-99, 102-103, 132). The dispatcher relayed the information to police who were proceeding to the scene of the robbery (R. 34, 39, 49, 132).

The police arrived at the house within minutes and were admitted to the premises by respondent's wife without objection. After ascertaining that no male was hiding on the first floor, one officer went to the basement and two officers proceeded upstairs (R. 39, 52-53, 56, 132). Respondent was found in an upstairs bedroom feigning sleep and was arrested (R. 39, 71-73, 132). One officer, hearing the continuous running of the toilet in an adjacent bathroom, found and seized a sawed-off shotgun and a pistol from the flush tank (R. 39, 59-61, 132). In a further search of the room, ammunition for the guns was found, as

well as a sweater and cap which were similar to the clothing described. ~~These~~ the clothing ~~were~~^{was} found under respondent's mattress (R. 39, 61, 106-114, 132-133).

In the meantime, the officer searching the basement found a jacket and a pair of pants, complete with leather belt, in a washing machine. These articles were seized as fitting the description of the clothing worn by the robber (R. 40, 56-57, 133). The items of clothing seized, as well as the guns and ammunition, were admitted into evidence at trial without objection.

Respondent was convicted of robbery with a deadly weapon in the Criminal Court of Baltimore and sentenced to imprisonment for a period of fourteen years (R. 37-38, 41, 92, 126-127). Upon unsuccessful pursuit of post-conviction relief in the Maryland State courts, respondent filed the instant petition for a writ of habeas corpus in the United States District Court for the District of Maryland. The petition was denied on the finding that the arrest was lawful and the search and seizures were reasonable (R. 37-45). The court of appeals (one judge dissenting) agreed that the arrest and search were lawful but reversed because the clothing seized during the lawful search was held to be immune from seizure under the rule enunciated by this Court in *Gouled v. United States*, 255 U.S. 298 (R. 131-149).

INTRODUCTION AND SUMMARY OF ARGUMENT

The majority of the court below held that respondent's arrest had been lawful and that the search (in the course of which the telltale clothing was found) was permissible as incidental to that arrest. It con-

cluded, however, that the seizure of the clothing was constitutionally forbidden because of "the principle repeatedly declared by the Supreme Court [that] items having evidential value only are not subject to seizure and must be excluded at trial" (R. 137-138)—a principle which the court determined to be "of constitutional dimensions" (R. 138). In so doing the majority below recognized that "eminent judges and scholars have challenged the correctness and wisdom of [that] rule * * *" (R. 143). As *amicus* in this case we urge three alternative positions:*

First, and most importantly, we argue that the "mere evidence" limitation is unsound in all of its applications; that the rights secured by the Fourth Amendment bear no relation to the nature of the property being sought or seized; and that searches for specific evidentiary items, if conducted upon probable cause and with "the procedure of antecedent justification before a magistrate" (*Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272), are authorized by the Fourth Amendment.

Second, we argue that, irrespective of whether the Constitution permits a search for items which are of evidentiary value only, there is no constitutional language or policy prohibiting the seizure and retention of purely evidentiary matter if it is found in the course of a search incidental to arrest or during a search for the fruit or instrumentality of a crime. In brief, we urge that such protections for privacy as might be afforded by a total constitutional prohibition

*We do not discuss the propriety of collateral relief where the sole challenge is to the admissibility of evidence obtained by a search since that issue had not been raised by the petition.

upon the institution of a search for "mere evidence" are beside the point when the question is whether evidentiary items may be seized if found in the course of a non-evidentiary search.¹

Third, and most narrowly, we suggest that if the "mere evidence" rule is correct and if the only objects (other than contraband or other illegally possessed property) which may constitutionally be seized are "fruits" and "instrumentalities" of crime, these permissible categories should be construed liberally so that any tangible property which is believed to have facilitated the commission of the offense in any manner whatever would constitute an "instrumentality" thereof. Articles of clothing such as those seized here have been held by the federal courts to be "instrumentalities" of crime, and that rule should have been applied in this case.

We are not, of course, unaware of the fact that there is support for the "mere evidence" restriction in decisions of this Court—notably in *Gouled v. United States*, 255 U.S. 298, and in *United States v. Lefkowitz*, 285 U.S. 452. We recognize that by arguing for reversal of the decision below on either of our first two grounds we are seeking a departure from the relevant holding *Gouled*. We think it important to emphasize at the outset, however, that our challenge to *Gouled* and to the "mere evidence" doctrine which has developed from that decision does not draw in question this Court's decision in *Boyd v. United*

¹ We use the term "evidentiary" throughout this brief as referring to property which is of "evidential value only" or to a search for such property. By "non-evidentiary" we mean a search for property which falls into the categories held by the court below to be constitutionally subject to seizure.

States, 116 U.S. 616. We agree, in other words, that where a search or compulsory production of evidence involves the Fifth Amendment's protection against compelled self-incrimination, this Court's decision in *Boyd* controls. The heart of our argument is that *Boyd* has been erroneously extended under the *Goulded* decision and the "mere evidence" doctrine applied to instances involving no conceivable violation of a Fifth Amendment privilege. It is in those circumstances, we believe, that the courts have erred in concluding that the Fourth Amendment, standing alone, bars searches for and seizures of property which is "of evidential value only."

ARGUMENT

I

THE BILL OF RIGHTS DOES NOT PROHIBIT A SEARCH FOR AND SEIZURE OF AN OBJECT WHICH IS OF EVIDENTIAL VALUE ONLY

We begin with the language of the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *," permits warrants for searches and seizures to issue only "upon probable cause, supported by oath or affirmation * * *," and requires that such warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." The Amendment obviously contemplates the seizure of "things" pursuant to a warrant; it imposes no limitation on the nature of these "things" other than its general prohibition against "unreasonable searches and seizures." From

the constitutional language itself, there is no reason whatever to suppose that a search warrant which meets the requirements of particularity and which is based upon sworn information amounting to probable cause may not issue if the "thing" being sought is "of evidential value only."

We submit, moreover, that there is nothing in the history of the Fourth Amendment to warrant characterizing an otherwise lawful search for a particularized evidentiary object (or its seizure) as "unreasonable." Nor is there any unique contemporary need for privacy with respect to evidentiary property which would justify treating it differently from the "instrumentalities" or "fruits" of crime. As we demonstrate below (pp. 10-12, *infra*), the "mere evidence" doctrine appears to be a vestige of an early stage in the development of our criminal jurisprudence. In today's world it serves no legitimate function and deserves no place in the law. For, as Chief Justice Traynor recently observed on behalf of the unanimous Supreme Court of California, the rule "creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant." *People v. Thayer*, 63 Cal. 2d 635, 637, 408 P. 2d 108, 109, certiorari denied, 384 U.S. 908. The Supreme Court of New Jersey, also speaking unanimously through its Chief Justice, reached the same conclusion one year earlier, holding that "the Fourth Amendment contemplates that things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable and the Fourth Amendment's formal requirements, if appli-

cable, are met." *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 193.

A. THERE IS NO HISTORICAL SUPPORT FOR THE PROPOSITION THAT THE FOURTH AMENDMENT WAS INTENDED TO FORBID SEARCHES FOR EVIDENTIARY MATTER OTHER THAN PRIVATE PAPERS

Students of the history and origin of the Fourth Amendment are in general agreement that this article was included in the Bill of Rights to prevent the abuses of the power to search which had become notorious in England and the Colonies before the American Revolution. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, pp. 22-105 (1934); Landynski, *Searches and Seizures and the Supreme Court*, pp. 19-40 (1966); *Frank v. Maryland*, 359 U.S. 360, 363-366. This Court has discussed the evils which the Fourth Amendment was designed to overcome—the use of the general warrant in England and the writs of assistance in the Colonies—the resistance to these abuses by men like John Wilkes and James Otis, and the landmark decision in *Entick v. Carrington*, 19 How. St. Tr. 1029, on too many occasions to warrant repetition here. See, e.g., *Stanford v. Texas*, 379 U.S. 476, 481-485; *Marcus v. Search Warrant*, 376 U.S. 717, 724-729; *Frank v. Maryland*, 359 U.S. 360; *Harris v. United States*, 331 U.S. 145, 157-161 (dissent); *Boyd v. United States*, 116 U.S. 616, 624-629. This history constituted, as this Court observed in *Marcus v. Search Warrant*, 376 U.S. 717, 729, "part of the intellectual matrix within which our own constitutional fabric was shaped." What it discloses is that the Founding Fathers were concerned with two

kinds of invasions of privacy—warrantless searches and searches under an indiscriminate general authority. It was to protect “the sanctity of a man’s home and the privacies of life” (*Boyd v. United States*, 116 U.S. 616, 630) against unauthorized or overbroad invasions that the Amendment was adopted.

To insure that a man’s home might not be invaded at the whim of government officials, “the Fourth Amendment interposed a magistrate between the citizen and the police * * * [and required the] magistrate to pass on the desires of the police before they violate the privacy of the home.” *McDonald v. United States*, 335 U.S. 451, 455–456. And to insure that “no official of the State shall ransack [a man’s] home and seize his books and papers under the unbridled authority of a general warrant” (*Stanford v. Texas*, 379 U.S. 476, 486), the draftsmen of the Bill of Rights authorized the issuance of only such search warrants as “particularly describ[e] the place to be searched, and the persons or things to be seized.” There is no suggestion in the history of the Colonies or of seventeenth or eighteenth-century England that searches for “mere evidence” were a source of resentment or, indeed, that a power to search for evidentiary objects was exercised to any substantial degree.

In fact, our examination of the relevant history leads us to conclude that searches and seizures were conducted in England and the colonies principally for the purpose of gaining custody of forfeitable property and not in order to sequester evidence for trial.

There was apparently no provision in English law for the return of property which had been seized under a warrant. Consequently, if property was once seized, it remained forever in the custody of the state. Lord Camden's distinction in *Entick v. Carrington*, 19 How. State Tr. 1029, 1066, between a warrant for stolen goods and a general warrant supports this conclusion (emphasis added):

[T]he difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, *and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.*

It is not surprising, therefore, that objects "of evidential value only" were not ordinarily subject to the power of search and seizure. Unlike fruits of crime—which were rightfully the property of the victim and could be reclaimed by public officers—or the tangible objects by which a felony was committed—which may have been forfeit to the crown as *deodand*²—"mere evidence" could not be permanently taken by the state. Lacking any specific authority to

² Black's Law Dictionary (4th ed.), p. 523, defines "deodand" as follows:

In English law. Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses, and distributed in alms by the high almoner. See also 1 Blackstone, *Commentaries* 300-302; Holmes, *The Common Law* 7, 24-26.

take temporary possession of such property in order to use it at a criminal trial, the state was unable to reach it at all.

The fact that seizures of "mere evidence" by warrant were not customary in the pre-Revolutionary period³ does not mean that they were forbidden by the Fourth Amendment. That constitutional provision did not freeze the power to search or seize to the particular kinds of searches and seizures which had theretofore been conducted. Unlike the Seventh Amendment, the Fourth did not incorporate the then prevailing "rules of the common law." It prohibited only "unreasonable" searches and seizures, thereby affording room for application of the constitutional command in light of contemporary conditions. In *Carroll v. United States*, 267 U.S. 132, for example, this Court held that it was not unreasonable and therefore constitutionally permissible to search moving vehicles on probable cause without a warrant, even though such searches could hardly have been common at the time of the adoption of the Fourth Amendment.⁴

³ It is important to distinguish, in this regard, between seizures under a general warrant and more specific searches and seizures. Obviously, as *Entick v. Carrington* and the other historic decisions in this area demonstrate, there were instances in which evidentiary matter was seized in the course of a general search for allegedly seditious libels. See, particularly, the description of the search of John Wilkes provided by Lord Camden in the *Entick* decision, 19 How. State Tr. at 1065-1066. That situation is distinguishable from a search for a specific evidentiary item.

⁴ It is true that the Court did rely in *Carroll* on certain statutes enacted by the early Congresses to show that customs officials had then been authorized to search, without a warrant, ships, vehicles or beasts which, they had reason to suspect, were carrying merchandise which had been unlawfully im-

Temporary seizure of property for use as evidence at a criminal trial is part of our modern legal system. We recognize today that an individual and his property are subject to "certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery," and that exemptions from these duties must be based upon "substantial individual interest, which has been found, through centuries of experience, to outweigh the public interest in the search for the truth." *United States v. Bryan*, 339 U.S. 323, 331. See generally 8 Wigmore, *Evidence* §§ 2192-2194 (McNaughton rev. 1961). Rule 17(c) of the Federal Rules of Criminal Procedure authorizes the issuance of subpoenas for documentary evidence and other objects in a criminal proceeding, and the property brought into the custody of the court under such circumstances is obviously returnable when it has served its evidentiary function. Indeed, the power to compel the production of documents in civil cases for evidentiary purposes at a trial was explicitly recognized as early as the first Judiciary Act, 1 Stat. 82.⁵ It follows, therefore, that it would not be con-

ported. 267 U.S. at 150-152. Even assuming that these statutes granted a power which went beyond the unique authority to conduct comprehensive border searches (see *Alexander v. United States*, 362 F. 2d 379 (C.A. 9)), they hardly established a customary practice of conducting warrantless searches of moving vehicles.

⁵ *Entick v. Carrington* was decided on the premise that the production of documents could not be compelled even in civil cases. Lord Camden said (19 How. Stat Tr. at 1073):

Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering

sistent with the historical purpose of the Fourth Amendment to construe it as preventing government officials from conducting an otherwise limited, reasonable and judicially authorized search designed to find and take into their custody, for the duration of a legal proceeding, an object which is purely evidentiary.

Nor is the historical argument supported by the language in *Entick v. Carrington*, 19 How. State Tr. 1029, 1073, which suggests that a search for, and seizure of, an evidentiary object is a form of self-incrimination. Lord Camden's observation that a "search for evidence is disallowed upon the same principle" as the rule "that the law obligeth no man to accuse himself" was in response to the "argument of utility" that "a *paper-search* [was desirable] in these cases to help forward the conviction." 19 How. State Tr. at 1073 (emphasis added). We of course agree, for reasons stated more fully below (pp. 27-31, *infra*), that a search for evidentiary private documents — a "paper-search"—would present serious questions under the

evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

Compare Section 15 of the first Judiciary Act, which empowered courts "in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery * * *." 1 Stat.

Fifth Amendment and would likely run afoul of *Boyd v. United States*, 116 U.S. 616. But the relevant passage in *Entick v. Carrington* cannot be taken, we submit, as holding that a taking of tangible evidence from the premises of an accused is, *ipso facto*, a violation of his privilege against self-incrimination. For what Lord Camden had in mind was the question whether process might be directed "against papers" (19 How. State Tr. at 1073-1074), not against clothing or other tangible non-testimonial objects.

Scholars who have examined the history and origins of the Fourth Amendment have concluded that it was designed for a purpose distinct from that of the Fifth Amendment's privilege against self-incrimination. See 4 Wigmore, *Evidence* § 2264, approved in Chaffee, *The Progress of the Law 1919-1922*, 35 Harv. L. Rev. 673, 697 (1922), and in Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 366-367 (1921). The policies underlying the Fifth Amendment privilege afford no historical basis, therefore, for reading into the Fourth Amendment any intention on the part of the Constitutional framers to prohibit the seizure of objects (other than private papers) for use as evidence in a criminal trial.*

* We do not read the opinion of a majority of this Court in *Frank v. Maryland*, 359 U.S. 360, 363-366, as construing this history any differently. Mr. Justice Frankfurter, speaking for the majority in *Frank*, said that one of the two protections afforded by the Fourth Amendment, in light of its history, was "self-protection: the right to resist *unauthorized* entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. Thus, evidence of criminal action may not,

**B. THE RIGHTS OF PRIVACY SECURED BY THE FOURTH AMENDMENT
ARE NOT INFRINGED BY OTHERWISE REASONABLE SEARCHES FOR
EVIDENTIARY NON-TESTIMONIAL OBJECTS**

Laying history to one side, we turn to the question whether, in relation to the interests protected by the Fourth Amendment, there is any rational contemporary justification for the rule that "mere evidence" may not be seized in an otherwise reasonable and lawful search. We believe that the limitation applied by the court below furthers no objective of the Fourth Amendment—that prohibiting the seizure of "mere evidence" unduly limits law enforcement officials without contributing, in any substantial manner, to the rights of privacy secured by the Fourth Amendment.

We start from the proposition that the heart of the Fourth Amendment is "[t]he security of one's privacy against arbitrary intrusion by the police" (*Wolf v. Colorado*, 338 U.S. 24, 27)—i.e., "the right to shut the door on officials of the state unless their entry is under proper authority of law" (*Frank v. Maryland*, 359 U.S. 360, 365). The Fourth Amendment does, however, permit the state to infringe upon the protected privacy—to force open the door—if a judicial officer has authorized the search after being persuaded that it is based upon probable cause and is, therefore, not arbitrary.

The "right of the people" to close their homes and other private premises to unauthorized and arbitrary

save in very limited and closely confined situations, be seized *without a judicially issued search warrant.*" 359 U.S. at 365 (emphasis added). This conclusion does not, we submit, reflect at all on searches made pursuant to *authorized* entries or *with* judicially issued search warrants.

government intruders is not advanced in the least, we submit, by the "mere evidence" limitation. For a search warrant directed to a particular evidentiary object infringes on privacy no more than a search warrant directed to a particular "instrumentality" or "fruit" of the offense. The suspect who conceals a gun or the proceeds of a robbery in his home is obliged to suffer a lawful search for the instrumentality or fruit; the suspect who hides his shoes because they would provide a means of placing him at the scene of a crime or hides his shirt because it is stained by his victim's blood should be subject to the same limited intrusion. We stress that almost invariably the state's real purpose is the same whether the object being sought is an "instrumentality" or is "mere evidence"; in both cases it is taken for possible use at trial. Forfeiture or *deodand* may be a theoretical possibility with regard to instrumentalities, but it would be blinking reality to distinguish their seizure from the seizure of "mere evidence" merely because of that improbable objective.

There is nothing inherent in a search for evidentiary matter which would conflict with the Fourth Amendment's requirement of specificity. A search warrant for evidence is, doubtless subject to the same constitutional restrictions as a warrant for "instrumentalities" or "fruits"—it must "particularly describe[e] the place to be searched, and the * * * things to be seized." If the police wish to search a suspect's home, for example, because they have probable cause to believe that they would find a box of unique cigars which are similar to a cigar butt found

at the scene of the crime or because they have reason to believe that fibers found in the fingernails of a dead victim would match the material of a rug or drapes in a suspect's apartment, the warrant must specify what is to be seized. No greater opportunity for general searches is afforded by a rule permitting evidence to be sought than now exists if the police search under a warrant for fruits or instrumentalities.

Nor need there be any dilution of the requirement that searches be conducted only upon evidence amounting to probable cause as presented to "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14. So long as the requirements of specificity and probable cause remain undisturbed, there is no danger that innocent persons will be subjected to arbitrary intrusions upon their privacy.

Finally, we note that nothing in the nature of property seized as evidence renders it more private, and thereby more subject to the protections of the Fourth Amendment, than property which is seized as the instrumentality of a crime. Apart from testimonial or communicative private papers—which we recognize as fully subject to the protection of the Fifth Amendment (pp. 27–31, *infra*)—the very same "papers and effects" may constitute "instrumentalities of crime" in some circumstances and "mere evidence" in others. Compare *United States v. Kirschenblatt*, 16 F. 2d 202 (C.A. 2); *United States v. Poller*, 43 F. 2d 911 (C.A. 2); *Takahashi v. United States*, 143 F. 2d 118

(C.A. 9); *Bushouse v. United States*, 67 F. 2d 843 (C.A. 6); *United States v. Thomson*, 113 F. 2d 643 (C.A. 7); *Williams v. United States*, 263 F. 2d 487 (C.A. C.A.), with *Marron v. United States*, 275 U.S. 192; *Foley v. United States*, 64 F. 2d 1 (C.A. 5); *Landau v. United States Attorney*, 82 F. 2d 285 (C.A. 2); *United States v. Boyette*, 299 F. 2d 92 (C.A. 4). Whether they fall into one category or the other depends not on any intrinsic characteristic of the property being seized but rather on the peculiar circumstances of the offense being investigated. Indeed, there may be circumstances in which the instrumentality of the offense is itself more clearly within a zone of privacy than "mere evidence" would be. There could be no doubt, for example, that in enforcing the statute held unconstitutional in *Griswold v. Connecticut*, 381 U.S. 479, police officers would be engaging in a far more offensive invasion of privacy if they searched for the instrumentalities of crime than if they searched for "mere evidence," such as proof that the prohibited product had been purchased or secondary evidence of its use. See 381 U.S. at 485.

We recognize, of course, that a lawful search may be invalidated by what is seized. See *Kremen v. United States*, 353 U.S. 346. We also assume that there may be "papers and effects" which are so inherently personal that for government officials to seize them would, *ipso facto*, amount to an impermissible invasion on the "privacies of life" secured by the Fourth Amendment. But these considerations hardly suggest that one should draw a line as between prop-

erty seized as the instrumentality of an offense and property seized as evidence. If a seizure is invalid because the items seized are too private to permit them to be reduced to government custody, it should make no difference whether they are instrumentalities of crime or "mere evidence." Similarly, if a seizure is too sweeping to pass constitutional muster—as was the seizure in *Kremen v. United States*, *supra*—it should make no difference whether the objects seized are instrumentalities or only evidence of crime. Cf. *Marcus v. Search Warrant*, 367 U.S. 717, 730–731; *A Quantity of Books v. Kansas*, 378 U.S. 205, 212; *Stanford v. Texas*, 379 U.S. 476, 484–486. It is for these reasons that we believe that there is no basis in the protections afforded by the Fourth Amendment for the "mere evidence" rule as it has evolved since this Court's decision in *Gouled v. United States*, 255 U.S. 298.

To be sure, a ruling by this Court that searches for objects "of evidential value only" are constitutionally permissible might result in some increase in the number of searches. But we emphasize that these would have to be *lawful* searches—under a particularized warrant issued only where there is probable cause to believe that the specific evidence being sought is, in fact, on the premises.

In *Escobedo v. Illinois*, 378 U.S. 478, 488–489, this Court observed that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skill-

ful investigation." And in *Miranda v. Arizona*, 384 U.S. 436, 481, the Court noted that "standard investigating practices" were generally adequate to solve crimes of the nature then under consideration, and that confessions were not, therefore, essential.⁷ It is fitting, we suggest, that the anachronistic "mere evidence" rule, which artificially limits searches and seizures, be overruled at the same time as law enforcement officials are urged to turn their efforts to "extrinsic evidence independently secured through skillful investigation." The very "extrinsic evidence" which may be needed to solve a crime and convict the offender is likely to be in his home, in the private premises of an accomplice or in some other area protected by the Fourth Amendment. If the police are powerless to reach it unless they can qualify it as an "instrumentality" of the offense, the alternative route encouraged by this Court may lead only to a dead end.⁸

⁷ The Court called attention (384 U.S. at 481, n. 51) to eyewitness testimony in three of those cases and to items which had been discovered during the search of an automobile and a home in two of the cases. Although the items referred to were "fruits" of crime, it is not inconceivable that "mere evidence," rather than fruit, might have been found.

⁸ We note that even so vigorous a proponent of civil liberties as the late Professor Zechariah Chafee, Jr., viewed the consequence of the "mere evidence" rule as undesirable. Shortly after the decision in *Gouled v. United States*, 255 U.S. 298, Professor Chafee wrote:

Unfortunately, the form in which the case was certified to the Supreme Court makes it impossible to limit the decision to the sensible proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material. The decision necessarily holds that

C. THE SEIZURE OF EVIDENTIARY OBJECTS OTHER THAN PRIVATE PAPERS DOES NOT VIOLATE THE FIFTH AMENDMENT

A rationale occasionally offered for the "mere evidence" rule is that the seizure of evidentiary matter from an accused amounts to an invasion of his constitutional privilege against self-incrimination.⁹ We believe that this suggestion is unsound insofar as it relates to tangible objects other than testimonial or communicative private papers.

such a seizure violates the Constitution, so that Congress cannot authorize it hereafter, even with a search warrant. Consequently, a criminal, who is clever enough to gather into his possession all the damaging documents which are not actually instruments of crime, will always be able to defy the Government to make the slightest use of such papers against him. What are the police to do, even though they know exactly where the evidence is? They cannot obtain a subpoena *duces tecum* ordering him to bring the papers into court himself, for that would violate his privilege against self-incrimination. They cannot break into his house with a search warrant and take the papers from him by force, because the warrant would be invalid and the evidence wholly inadmissible, at least if the accused made a seasonable demand for its return. This "astonishing situation" stirs the *Yale Law Journal* to apply Wigmore's phrase, "justice tampered with mercy."

Chafee, *The Progress of the Law 1919-1922*, 35 Harv. L. Rev. 673, 699 (1922).

⁹ See, e.g., *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185; Comment, 20 U. Chi. L. Rev. 319, 324 (1953). In *Sealed v. United States*, 255 U.S. 298, 311, the Court held that the *admission in evidence of unlawfully seized* objects violated the privilege against self-incrimination. Compare *Mapp v. Ohio*, 367 U.S. 643, 661 (concurring opinion). That is, of course, a substantially different proposition from the suggestion that the seizure is, in the first instance, unlawful because it violates the privilege.

The scope of the Fifth Amendment privilege with respect to an individual's testimony and property was outlined by this Court in *United States v. White*, 322 U.S. 694, 698-699:

The Constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. * * * [The privilege] protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

A search and seizure involves no disclosure, production or authentication by the accused himself. As Professor Chaffee observed, "the privilege is violated when a man is compelled to do something active, whereas he usually remains passive during an unreasonable search and seizure." Chaffee, *The Progress of the Law, 1919-1922*, 35 Harv. L. Rev. 673, 697-698 (1922). With respect to a search and

seizure, even more than with respect to other conduct which has been held not within the privilege against self-incrimination, the accused's "participation * * * [is] irrelevant." *Schmerber v. California*, 384 U.S. 757, 765.

The *Schmerber* decision establishes, we submit, that the seizure of "mere evidence" which is not testimonial or communicative does not violate the Fifth Amendment privilege. This Court held in *Schmerber* that the seizure of a blood sample from the body, taken under clinical conditions and upon probable cause to believe it contained evidence of intoxication, was a reasonable search and seizure under the Fourth Amendment, and that such withdrawal of blood and use of the analysis as evidence at trial did not involve compulsory self-incrimination. 384 U.S. at 761-762. In so holding, the Court stated that "the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature * * *." In response to a dissent suggesting that the report of the blood test was "testimonial" or "communicative" because the test was performed in order to obtain the testimony of others, the majority responded (384 U.S. at 761, n. 5):

Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial"

or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

The blood seized from the petitioner in *Schmerber* was plainly "mere evidence." Indeed, the Court characterized the State's conduct as compelling petitioner "to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense." 384 U.S. at 761. Notwithstanding this characterization, the Court held that the privilege against self-incrimination had not been violated. It said that "the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States*, 116 U.S. 616." 384 U.S. at 763-764. We draw the same distinction here. So long as no testimonial or communicative evidence is involved, the seizure of "mere evidence" infringes upon no Fifth Amendment right.

Boyd v. United States, 116 U.S. 616, marks the dividing line between what is permissible and what is not. In *Boyd* a subpoena was served upon the owner of certain goods against which a forfeiture proceeding had been instituted. The subpoena, which was issued under the authority of an Act of Congress, sought to compel the production of an invoice under which goods had been brought into the country. The

Court held that "compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property," was indistinguishable from a search and seizure and was, therefore, "within the scope of the Fourth Amendment" (116 U.S. at 622); that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [*Entick v. Carrington*]" (116 U.S. at 630); and that "the seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself" (116 U.S. at 633).

The decision in *Boyd* turned, we believe, on two factors not present in this case or in most cases involving seizures of "mere evidence."

First, as the concurring Justices observed (116 U.S. at 638-641), *Boyd* involved a subpoena issued to the accused himself; it therefore presented a most straightforward self-incrimination claim. It was well settled in English law long before the adoption of the United States Constitution that a defendant in a criminal trial could not be compelled to come forward and produce any tangible or testimonial evidence whatever. See 10 Halsbury's Laws of England (3d ed.), §837, p. 456, and cases cited at note (s). Even if the object sought by subpoena in *Boyd* had been a weapon or contraband or fruits of crime, the Fifth Amendment privilege against self-incrimination would have entitled the defendant to refuse to comply because in responding to the subpoena he

would have to produce and authenticate the incriminating evidence. See *Curcio v. United States*, 354 U.S. 118, 125; *United States v. White*, 322 U.S. 694, 698-699. Indeed, it seems quite clear from more recent decisions that the vice in *Boyd* was precisely that the invoice was sought by subpoena rather than by warrant; the Court has held since *Boyd* that documents similar in kind to the paper sought in that case are instrumentalities of crime and may be seized as such. *Marron v. United States*, 275 U.S. 192; *Zap v. United States*, 328 U.S. 624.

Second, the Court in *Boyd* emphasized the fact that the subpoena in that case attempted to reach private papers—much the same defect which Lord Camden had found in a “paper-search” in *Entick v. Carrington*. See pp. 14-15, *supra*. A suspect’s private papers may, of course, be “testimonial” or “communicative” and thereby come within the reach of the Fifth Amendment as construed in *Schmerber v. California*, 384 U.S. 757. Copies of private correspondence may, for example, contain admissions of crime or of conduct which may constitute a “link in the chain of evidence needed to prosecute * * * for a federal crime.” *Hoffman v. United States*, 341 U.S. 479, 486. In this respect there can be no dispute over the truth of this Court’s observation in *Boyd* that “we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.” 116 U.S. at 633. It would doubtless violate “the spirit and history” (384 U.S. at 764), if not the letter, of

the Fifth Amendment if government agents who learned of the existence of a private document in which a suspect had confessed to the commission of a crime obtained that paper, for use as evidence against the suspect, by a search of his home. That, we believe, might well constitute "communicative" or "testimonial" evidence taken by compulsion from the accused himself, and it would be subject to a Fifth Amendment challenge.

For the above reasons, we do not contend that "private papers" such as a personal diary or copies of personal correspondence may be seized consistently with the Fourth and Fifth Amendments. Even where such documents are not strictly "testimonial" or "communicative," they are likely to be so intrinsically personal that to permit government agents to search through them would infringe upon the privacy which the Fourth Amendment was designed to secure.¹⁰ See pp. 16-20, *supra*. Moreover, we recognize that once a search through private papers is authorized—even if its objective be an impersonal document wholly devoid of "testimonial" or "communicative" content—government officers thereby gain access to papers which they have no right to see

¹⁰ Lord Camden said in *Entick v. Carrington*, 19 How. State Tr. at 1066:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. * * *

because they are private or because they contain self-incriminatory admissions.¹¹ For these reasons we limit our argument in this case to searches for tangible objects other than private papers. That limitation is not intended to apply, however, to ordinary commercial and official documents such as business records, passports, decoding tables, utility bills and the kinds of papers which would qualify as instrumentalities of a commercial criminal endeavor such as was involved in *Marron v. United States*, 275 U.S. 192, 198-199.

D. INsofar AS IT IS RELEVANT, *GOULED V. UNITED STATES* SHOULD NO LONGER BE FOLLOWED

The third question certified to this Court in *Gouled v. United States*, 255 U.S. 298, concerned the issue involved in this case—i.e., whether papers “possessing evidential value” against suspects were seizable under a search warrant. The question related to three specific documents—an unexecuted written agreement, a written and signed contract and an attorney’s bill for legal services. The Court observed that the facts recited in the certificate did not show whether the papers were seizable as instrumentalities of crime.

¹¹ As Chief Justice Weintraub of the Supreme Court of New Jersey put it in *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185, 191:

[E]ven a search for a specific, identified paper may involve the same rude intrusion if the quest for it leads to an examination of all of a man’s private papers. Hence it is understandable that some adjustment may be needed, and presumably it is to that end that a search may not be made among a man’s papers for a document which has evidential value alone. * * *

(255 U.S. at 310-311), and it held that a search warrant might not constitutionally be used "as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding." 255 U.S. at 309. The Court specifically disclaimed any reliance on the fact that papers, as distinguished from other tangible objects, had been seized.¹² It relied entirely on the proposition—assertedly based on the earlier decision in *Boyd*—that a search warrant might be used "only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken." 255 U.S. at 309.

It is true that the opinion of the Court in *Boyd* did distinguish between searches for stolen or forfeited goods and searches of private papers on the grounds, *inter alia*, that "[i]n the one case, the government is entitled to the possession of the property; in the other it is not." 116 U.S. at 623. But that was plainly not the critical point in *Boyd*; if it were, there would have been no reason whatever for the Court to consider the

¹² "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant." 255 U.S. at 309.

relevance of the Fifth Amendment. And yet *Boyd* is essentially a Fifth Amendment case. The crux of the decision is, as we have shown (pp. 26-28, *supra*), that in two respects—as a demand on the accused to come forward and as a means of reaching private papers—the government's conduct in *Boyd* violated the Fifth Amendment's privilege against self-incrimination.

Gouled was wrong, we submit, insofar as it removed the Fifth Amendment underpinnings of *Boyd* and held that even where there is no possibility of self-incrimination a search for evidence violates the Fourth Amendment. The proper understanding of the Fourth Amendment as applied in *Boyd*; we submit, is that under a warrant or in any other circumstances where a search is lawful under the Fourth Amendment, any property having evidential value may be taken for purposes of trial unless, because of the inherent nature of what is taken, its seizure violates the Fifth Amendment's privilege against self-incrimination, some other particular interest of privacy, or a discrete constitutionally protected right.¹³

There have been several opinions of this Court since *Gouled* in which the "mere evidence" rule was repeated,¹⁴ but we know of no other case in which it was

¹³ The First Amendment is, of course, involved when printed matter intended for distribution is seized. Stricter standards are appropriate in such circumstances than when no First Amendment interest is at stake. See *Stanford v. Texas*, 379 U.S. 476, 484-485; *A Quantity of Books v. Kansas*, 378 U.S. 205, 212; *Marcus v. Search Warrant*, 367 U.S. 717, 730-731.

¹⁴ *Harris v. United States*, 331 U.S. 145, 154; *United States v. Rabinowitz*, 339 U.S. 56, 64 n. 6; *Frank v. Maryland*, 359 U.S. 360, 365; *Abel v. United States*, 362 U.S. 217, 234-235.

actually the ground of decision. In *United States v. Lefkowitz*, 285 U.S. 452, evidence was held inadmissible because it had been obtained by a general and exploratory search. In addition, the Court noted that the items seized were "unoffending" and were taken only for use as evidence, in violation of the rule of *Gouled*. 285 U.S. at 465-466. That observation, however, was not a ground of decision.

On the other hand, within the past year this Court has, on three occasions, approved *sub silentio* seizures of "mere evidence." In *Schmerber v. California*, 384 U.S. 757, the blood taken from the petitioner was plainly not an instrumentality or fruit of the offense. Nonetheless the Court sustained its seizure against a Fourth Amendment challenge. In *Osborn v. United States*, 385 U.S. 323, a Fourth Amendment challenge was made to the use of a device with which a government informant secretly recorded a conversation he had with the petitioner in the petitioner's office. The Court rejected the claim on the theory that the judicial permission obtained before the recording was made was the equivalent of a search warrant for Fourth Amendment purposes. The Court did not consider whether what was seized—i.e., petitioner's words—were "instrumentalities" of the crime or "mere evidence."¹⁵ And finally, in *Cooper v. California*, No. 103, this Term, decided February 20, 1967, the object found in

¹⁵ The government argued that since the conversation was part of petitioner's attempt to obstruct justice, the words were, in fact, instrumentalities of the offense. See Brief for the United States, No. 29, this Term, p. 34. The Court did not, however, pass on this contention.

the petitioner's seized automobile introduced in evidence was "a small piece of a brown paper sack" which matched the brown paper in which heroin sold to an informant had been wrapped. See Record, No. 103, this Term, pp. 86-87, 130-131, 157, 254, 270. The "small piece" of brown paper was obviously of "evidential value only"; it had not been used as wrapping and was relevant only because it connected petitioner to the package of narcotics. Yet this Court sustained the conviction, apparently holding that the seizure of the paper was authorized because the search of the automobile was a permissible one.

These recent cases, as well as recent and unanimous decisions of the highest courts of New Jersey and California,¹⁶ strongly suggest that the *Goulded* decision, insofar as it related to the third and fourth certified questions in that case, is no longer a viable precedent. This Court recognized in *Ker v. California*, 374 U.S. 23, 33, "that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application * * *." We believe that the standard established in the *Goulded* decision is erroneous and that it should no longer be followed.

II

IRRESPECTIVE OF WHETHER SEARCH WARRANTS MAY CONSTITUTIONALLY ISSUE FOR PROPERTY WHICH IS OF EVIDENTIAL VALUE ONLY, SUCH PROPERTY MAY BE SEIZED IN THE COURSE OF A SEARCH INCIDENTAL TO ARREST

Assuming, *arguendo*, that the protection afforded to the privacy of "persons, houses, papers, and effects"

¹⁶ *State v. Bisaccia*, 45 N.J. 504, 213 A. 2d 185 (1965); *People v. Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, certiorari denied, 384 U.S. 908 (1966).

by the Fourth Amendment justifies a constitutional rule that forbids their invasion by government agents seeking "mere evidence," that rationale is obviously inapplicable when the agents are lawfully on the premises for some other purpose and are authorized to search. When, as was true in this case, the search which produces the evidentiary property is a lawful search incidental to arrest, no greater invasion of privacy results if evidential objects are taken along with fruits and instrumentalities.

Judge Learned Hand commented upon this aspect of the "mere evidence" rule in *United States v. Poller*, 43 F. 2d 911, 914 (C.A. 2):

In conclusion, it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime.

We have previously observed that there is nothing inherent in evidentiary objects which distinguishes them from similar objects qualifying as instrumentalities of crime (pp. 18-19, *supra*). Consequently, we think it unlikely that "the quest itself"—the search

conducted by arresting officers—will be any less thorough if the *Gouled* rule is held applicable to searches incidental to arrest than if “mere evidence” is held to be seizable if found during such a lawful search.

It is already well established that objects subject to seizure may be taken if found in the course of a lawful search—even if they were not, in the first instance, the objects for which the search was conducted or in any manner related to the offense upon which the accused was arrested. *Abel v. United States*, 362 U.S. 217, 238; *Harris v. United States*, 331 U.S. 145, 153–154. In the instant case, no less clearly than in *Abel* and *Harris*, the officers were properly on the premises and engaged in lawful search when the objects in question were discovered. Since no interest in privacy was violated when the clothing was taken, it serves no Fourth Amendment policy to suppress its use as evidence.¹⁷

Indeed, statements by this Court in several opinions support the view that “mere evidence” may be seized in a search incidental to arrest. In *Weeks v. United States*, 232 U.S. 383, the Court observed that arresting agents had a right “always recognized under English

¹⁷ This Court said in *Abel* (362 U.S. at 238) that “[a]n arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers that a weapon will be concealed, or that relevant evidence will be destroyed.” (Emphasis added.) The danger that “relevant evidence will be destroyed” exists whenever objects of evidential value are discovered in the course of a lawful search. If they are not taken, the suspect or others who have access to the searched premises will be able to remove or destroy the evidence.

and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." 232 U.S. at 392. That observation was quoted and relied on by this Court as recently as *Schmerber v. California*, 384 U.S. 757, 769. And in *United States v. Rabinowitz*, 339 U.S. 56, this Court interpreted the doctrine to cover not only the *person* of the accused but also "the place where the arrest is made," noting that the power "seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for *other proofs of guilt* within the control of the accused found upon arrest." 339 U.S. 56, 61 (emphasis added). We submit that these conclusions accord with the policies of the Fourth Amendment because the seizure of "mere evidence" does not, in such circumstances, invade privacy to any greater extent than does the search itself.

III

CLOTHING WORN BY AN ACCUSED AT THE TIME WHEN THE OFFENSE WAS COMMITTED IS AN "INSTRUMENTALITY" OF THE CRIME

In any event, even if this Court were to sustain the "mere evidence" rule as applied to searches incidental to arrest, clothing worn by the defendant during the commission of the crime satisfies the standard of "instrumentalities used as a means of committing a criminal offense," as those terms have been liberally construed by this Court and the lower federal courts. What this Court said of business ledgers in *Marron v. United States*, 275 U.S. 192, 199, is applicable here:

And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. * * *

Clothing may not strictly be an instrumentality of the crime in the same sense as a weapon. But in offenses of stealth and violence, what the culprit wears is designed to aid in insuring the success of the criminal venture by reducing the chances of his identification and observation by witnesses. It is "part of the outfit or equipment actually used to commit the offense" within the meaning of the *Marron* decision.

No interest in privacy is served by forbidding the seizure of a tangible object so intimately related to the commission of the offense. If a suspected offender is arrested while still wearing the clothing in which he was dressed when the offense was committed, he would plainly have no constitutional right to insist on changing his garments and destroying those he is wearing before being taken into custody and viewed by witnesses. The same result should obtain, we believe, if he has succeeded in removing his clothing before arrest. The federal courts of appeal have repeatedly held that clothing worn by an accused while committing a crime, being so closely tied to the commission of the criminal act, is subject to seizure incidental to arrest. See, e.g., *Margeson v. United States*, 361 F. 2d 327 (C.A. 1), certiorari denied, 385 U.S. 830; *United States v. Caruso*, 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862; *Whalem v. United States*, 346 F. 2d 812, 813-814 (C.A.D.C.),

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CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be reversed.

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MARCH 1967.

¹⁸ *Morrison v. United States*, 262 F. 2d 449 (C.A.D.C.), is not to the contrary. In that case, clothing not worn during the commission of the crime was seized during an illegal search of the defendant's home.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 480

WARDEN OF THE MARYLAND PENITENTIARY,

Petitioner,

vs.

BENNIE JOE HAYDEN,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 480

WARDEN OF THE MARYLAND PENITENTIARY,

Petitioner,

vs.

BENNIE JOE HAYDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The Opinions of the United States Court of Appeals for the Fourth Circuit (R. 131-151) are reported at 363 F.2d 647, sub nom. *Hayden v. Warden, Maryland Penitentiary*.

The Opinion of the United States District Court for the District of Maryland (R. 37-45) is unreported.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 21, 1966 (R. 151). A Petition for Rehearing en banc was timely filed, and on June 3, 1966, the United States Court of Appeals for the Fourth Circuit filed an Order denying the Petition for Rehearing (R. 152). A judgment in lieu of mandate was issued to the United States District Court for the District of Maryland on June 13, 1966, and upon a Motion to Recall the Mandate, the judgment in lieu of mandate was recalled on July 13, 1966, pending the filing of a Petition for a Writ of Certiorari. The Petition for Writ of Certiorari was filed on August 25, 1966, and was granted on November 7, 1966 (R. 153). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether this Court should, as an incident to a lawful arrest, sanction the ransacking of all three floors of a home in a general exploratory search for evidence?
2. Whether this Court should permit the seizure of items of evidential value only unearthed during an intensive exploratory search?
- *3. Whether failure by respondent's trial counsel to object to the admission into evidence of the items seized during the search of respondent's home forfeited his right to assert his constitutional claims before this Court?

Statutes Involved

Amendment IV to the Constitution of the United States:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Amendment V to the Constitution of the United States:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Rule 41 (b) of the Federal Rules of Criminal Procedure, and Rules 522 d 2 and 885 of the Maryland Rules of Procedure are set forth in Respondent's Appendix, *infra*:

Statement

On March 17, 1962, at approximately 8:00 A.M., Charles E. McGuirk was assaulted and robbed of \$363 on the premises of the Diamond Cab Company in Baltimore (R. 93). Two cab drivers, alerted by shouts of "Holdup", saw a man running from the scene of robbery (R. 97, 102). Proceeding independently, they followed this man to Cocoa Lane (R. 98, 99, 103). One of the cab drivers, giving chase in his cab, testified that he saw this man enter 2111 Cocoa Lane and relayed this information, along with a description of the man, to his Diamond Cab dispatcher by radio (R. 49). He described the man as a Negro; about 5 foot 8, twenty-five years, wearing a light hat and dark jacket (R. 49, 132).

This information, in turn, was relayed to several Baltimore police patrol cars which, within minutes, converged at the above address, a two-story row house (R. 49, 50, 55, 106). The police surrounded the house and began banging on all three doors of the house (R. 118).

The respondent's wife was awakened by this tumult and was frightened (R. 118). She went downstairs in her nightgown and robe and opened the front door (R. 63, 118). She was confronted by four or five police officers, one of whom asked if a holdup man had just run into her house (R. 63, 118). She testified that her only response was "No," but that the police just shoved past her and, without her permission, began to search all three floors of the house (R. 64, 106, 118). The original four or five officers who had rushed in the front door were immediately joined in the search by other officers who came in through the back door (R. 118). The officers who proceeded to the

second floor found the respondent in one of the bedrooms dressed in white shorts and a T-shirt, and apparently asleep (R. 52, 53, 106). While these officers questioned the respondent the search of the basement and first floor continued (R. 56, 106). Finding no other male in the house, the officers arrested the respondent (R. 106) and continued the search (R. 59-61, 106). While the search of the three floors progressed, the arresting officers questioned the respondent, his wife and his five- and four-year-old children as to the respondent's whereabouts prior to their entry (R. 119).

The scope and intensity of the search both prior to and after the respondent's arrest were described by one of the arresting officers in this manner:

Q. Were you looking for money?

A. *Whatever we would find.*

* * * * *

Q. That is right. Did you look in his pants?

A. *We looked everywhere.*

Q. And you found no money?

A. That is right.

Q. How many officers came in the house, about ten or twelve of you, weren't there, rushed into the house, eleven or twelve?

* * * * *

A. Maybe five or six.

Q. Yes. And they searched the house from top to bottom, didn't they?

A. *Which is customary when you receive a call like that.* (Emphasis added) (R. 111-112).

The search covered all three floors of the respondent's home (R. 106). It involved the search of closets, bureau drawers, clothing, bedding—in short, the police looked “everywhere” (R. 64, 69, 112). Following the arrest and removal of the respondent from his home to the police station, the officers returned to 2111 Cocoa Lane and resumed their search (R. 65, 120). When asked what right they had to ransack her home without a search warrant, the respondent's wife testified that the police told her to shut up or she would be locked up (R. 65, 120).

The ransacking of the respondent's home yielded a harvest commensurate with its intensity. Prior to the arrest, a man's uniform, consisting of a waist-length jacket and matching trousers, with a leather belt in place, was found in the washing machine in the basement and seized (R. 56, 57). Following the arrest, an L. C. Smith shotgun and a P. 38 pistol were found in the toilet bowl tank in the second floor bathroom (R. 107). A loaded clip of P. 38 ammunition was found under the respondent's mattress and several 12 gauge shotgun shells were found in a bureau drawer (R. 107, 108). A man's grey cap and brown sweater were found under the respondent's mattress and were seized (R. 109).

All of these items were introduced into evidence against respondent at trial (R. 107-110). No objection was made by the respondent's trial counsel to the admission of these items into evidence because, as trial counsel testified at the habeas corpus hearing, he did not see any legal objection to their admissibility (R. 89, 90). The respondent was convicted of robbery and sentenced to a term of fourteen years in the Maryland Penitentiary (R. 41).

The respondent filed a Petition for Relief under the Maryland Post Conviction Procedure Act, which was denied without the taking of testimony on May 24, 1963 (R. 23-25, 41, 133). On Application for Leave to Appeal from this action, the Maryland Court of Appeals remanded the case for an evidentiary hearing. *Hayden v. Warden*, 233 Md. 613, 195 A.2d 692 (1963).

Following the hearing, on March 19, 1964, Judge Sodaro filed an order denying relief (R. 42), concluding that the arrest, search and seizure were proper (R. 43).

The respondent then filed an Application for Leave to Appeal to the Court of Appeals of Maryland, but before the Application could be acted upon, he requested to withdraw the Application and his request was granted (R. 36, 37).

On July 22, 1964, the respondent filed a petition for writ of habeas corpus in the United States District Court for the District of Maryland (R. 8). Following an evidentiary hearing, Judge Thomsen found the arrest, search and seizure to have been proper and denied relief (R. 43-45).

On Appeal to the United States Court of Appeals for the Fourth Circuit, the Order of the District Court denying relief was reversed (R. 131-144). The majority found the search to have been proper under the authority of *Harris v. United States*, 331 U.S. 145 (1947), but held that the items of *clothing* introduced into evidence against the respondent at trial were not properly seizable. The majority cited the decisions of the Supreme Court holding that items having only evidential value are not the subject of seizure and must be excluded at trial and stated that this proscription is clearly one of constitutional dimensions

under the Fourth Amendment (R. 138). A petition for a rehearing en banc was denied (R. 152).

The State of Maryland filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The Petition for Writ of Certiorari was granted on November 7, 1966 (R. 153).

Summary of Argument

Respondent first argues that the search of his home was illegal in its entirety. In a number of essential elements the search goes further than the extremely permissive limits set out in *Harris v. United States*, 331 U.S. 145 (1947). The *Harris* case itself has been subject to a good deal of criticism and abuse, and respondent therefore earnestly contends that this case presents the ideal vehicle for a much needed re-examination and clarification of the *Harris* doctrine.

Pointing out that the mere evidence rule will be the last remaining protection against exploratory searches for evidence if the Court approves the search made here in the name of *Harris*, respondent argues alternatively that in the circumstances of this case the Rule should be applied and the items of evidential value only seized during the ransacking of respondent's home should therefore not be admissible against him.

Failure by respondent's trial counsel to object to the admission into evidence of the items seized during the search of respondent's home has not forfeited his right to assert his constitutional rights in this federal habeas corpus action for two reasons. First, it is apparent from the rec-

ord that trial counsel simply did not know there were any grounds for objection (R. 89, 90). There was not, therefore, any tactical or strategic decision on his part not to object. Secondly, as the court below pointed out (R. 135), the State of Maryland did not interpose the failure to object as a bar to consideration of the merits of the constitutional issue. It would therefore be incongruous for a federal court to assert the state ground to shut off its review of the federal question.

A R G U M E N T

I.

This Court Should Not Sanction as an Incident to a Lawful Arrest the Ransacking of All Three Floors of the Respondent's Home in a General Exploratory Search for Evidence.

A. *Harris v. United States*, 331 U.S. 145 (1947), is the most permissive search and seizure case in the history of this Court. The present case significantly exceeds its limitations.

This Court has decided many cases dealing with the extent to which police may search a home without a search warrant but incident to a legal arrest. *E.g.*, *Ker v. California*, 374 U.S. 23, 40 (1963); *Abel v. United States*, 362 U.S. 217, 236 (1960). Clearly the most intense and wide-ranging search which has been upheld in such a context occurred in *Harris v. United States*, 331 U.S. 145 (1947). There, five policemen searched four rooms for five hours looking for two stolen checks which had been used in a fraudulent scheme. The decision sanctioning this search was rendered

by a Court split five-to-four, and has been controversial since the day it was handed down. Many commentators, as well as the four Justice minority, have been alarmed at the extent to which it authorizes warrantless searches. *E.g.*, Broeder, *Wong Sun: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 498-9 (1963); Carden, *Federal Power to Seize and Search Without a Warrant*, 18 Vand. L. Rev. 1, 11-12 (1966); Kaplan, *Search and Seizure, A No-Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474, 490-92 (1961); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. Ill. L. F. 255.

In order to uphold the search which occurred in the present case, the Court will have to go considerably beyond the limitations stated in the *Harris* opinion.¹

The *Harris* majority bottomed its opinion on the fact that the record showed clearly and unambiguously that the arresting officers were searching for very specific items, small in size, which could have been secreted anywhere in the defendant's apartment. At the outset of the opinion the Court stated at 331 U.S. 148, 149:

... The agents stated that the object of the search was to find two \$10,000.00 canceled checks of the Mudge Oil Company which had been stolen from that company's office and which were thought to have been used in effecting the forgery. There was evidence connecting

¹ Without waiving respondent's *pro se* contention that his arrest was illegal, counsel for respondent has briefed the case on the assumption that this Court will find the arrest based on probable cause and therefore legal. Counsel for respondent asks this court to consider all of respondent's contentions which are set forth at p. 14 of the Record on their merits. Counsel has briefed only those contentions which in his professional judgment are worthy of serious consideration by this Court.

petitioner with that theft. In addition, the search was said to be for the purpose of locating "any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a confidence game of this type."⁸

⁸ The agents who testified in the proceedings in the trial court clearly stated that the object of the search was the means employed in committing the crimes charged in the warrants of arrest. None of the subsequent statements of the agents, if read in their context, are in conflict with that assertion.

Throughout the opinion the Court returns again and again to this fundamental premise, justifying the intensity of the search by the uncontradicted purpose of the officers to seize these small items.

. . . The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment. Other situations may arise in which *the nature and size* of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive.

. . . The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still. We do not believe that the search in this case went beyond that which the situation reasonably demanded.

. . . Nor is this a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of con-

ducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. *Go-Bart Company v. United States*, *supra*; *United States v. Lefkowitz*, *supra*. In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which the warrants of arrest were issued. The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks of the Mudge Oil Company. The Circuit Court of Appeals found and the District Court acted on the assumption that the agents conducted their search *in good-faith* for the purpose of discovering the objects specified. That determination is supported by the record. The two canceled checks were stolen from the offices of the Mudge Oil Company. There was evidence connecting petitioner with that theft. The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose. 331 U.S. 152, 153. (Emphasis added.)

Further amplifying this crucial point, Justice Minton in *United States v. Rabinowitz*, 339 U.S. 56 (1950), distinguished the searches in *Harris* and *Rabinowitz* from those held illegal in *Go-Bart Importing Company v. United States*, 282 U.S. 344 (1931), and *United States v. Lefkowitz*, 285 U.S. 452 (1932), by stating:

In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here.

This "mark" of specificity imprinted upon the searches in both *Harris* and *Rabinowitz* is in fact the essence of principles followed by this Court in limiting the permissible boundaries of searches incident to arrest. These are:

1. That no search is reasonable which is conducted merely to obtain the evidence of a crime; hence general or exploratory searches aimed only at the uncovering of evidence which may aid in convicting are unreasonable.
2. That the justification for the initiation of a search will be determined upon the basis of facts known prior to the search.

If specificity as to objects sought is the "mark" of the permissible searches in *Harris* and *Rabinowitz*, while searches for "whatever might be turned up" is the "mark" of the illegal searches in *Go-Bart* and *Lefkowitz*, what then is the "mark" of the search presented in the case of Bennie Joe Hayden? When asked what objects were sought in the search of the respondent's home, Officer Duerr testified with remarkable candor as follows:

Q. Were you looking for money?

A. *Whatever we would find.*

* * * * *

Q. That is right. Did you look in his pants?

A. *We looked everywhere.*

Q. And you found no money?

A. That is right.

Q. How many officers came in the house, about ten or twelve of you, weren't there, rushed into the house, eleven or twelve?

A. I wouldn't say ten or twelve, no, sir.

Q. How many?

A. Maybe five or six.

Q. Yes. And they searched the house from top to bottom, didn't they?

A. *Which is customary when you receive a call like that*² (R. 112). (Emphasis added.) (Testimony of Officer Duerr at the original trial.)

The method of the search and the items seized confirm its express exploratory nature. At least five police officers and perhaps as many as ten or eleven stormed past respondent's wife, who had fearfully come down from the bedroom in response to the banging at her door (R. 118). Some of the officers came in through the back door (R. 118). They fanned out through the house, searching the basement, the main floor and the upstairs bedrooms contemporaneously (R. 106). Although the legitimate purpose of the search was to locate and arrest a colored assailant, a washing machine in the house was searched and a uniform jacket and trousers seized before it was established that a Negro male was even on the premises (R. 56). Bureau drawers and clothing were searched before it was established that respondent was the only Negro male on the premises (R. 69). It is submitted that when the police entered 2111 Cocoa Lane their purpose was not merely to search for and arrest a robbery suspect but to search for and seize "anything" that might prove to be evidence of

² For startling corroboration of this gratuitous revelation, see *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966). The callous disregard of the Fourth Amendment protection demonstrated by the Baltimore Police in this case was termed by Judge Sobeloff as "the most flagrant invasion(s) of privacy ever to come under the scrutiny of a federal court!" 364 F.2d at 201.

a crime as well. Following the arrest of the respondent, the purpose of their search was to seize "anything" that might link the respondent to the robbery, or to any other crime for that matter, thereby insuring his conviction. Curiously, the brown sweater found under the respondent's mattress has never yet been connected with the crime. It too was seized and admitted into evidence, however.

Aside from the lack of specificity of items searched for, "the total atmosphere" of the present case, *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), differs markedly from *Harris* in the following ways:

(1) Officer Duerr testified that the conduct of the search of the respondent's home from "top to bottom" was "customary when you receive a call like that"—(R. 112). The "customary" search procedures of the Baltimore Police are graphically revealed in the case of *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966). This class action, brought against the Police Commissioner of Baltimore on behalf of the Negro families of Baltimore, immediately resulted from a series of 300 searches conducted by the Baltimore Police during the period December 24, 1964, to January 12, 1965. In the words of Judge Sobeloff, "This case reveals a series of the most flagrant invasions of privacy ever to come under the scrutiny of a federal court." 364 F.2d at 201. Although these events occurred some eighteen months after the search of the respondent's home, the court noted at 364 F.2d 201 that:

The undisputed testimony indicates that the police in conducting the wholesale . . . raids were engaging in a practice which on a similar scale has routinely attended the efforts to apprehend persons accused of crime.

In considering the "total atmosphere" of the Hayden search, it is submitted that this Court should take into account the effect of such customary practices; conceived and authorized by high-ranking officials of the Baltimore Police Department, on the individual officers' respect for the Fourth Amendment. Against this background the seizure of evidential items without a warrant and before it was even established that a suspect was actually in the Hayden house is quite understandable (R. 69).

(2) In *Harris* an investigation had been made well before the entry and search, and the police had gone before a magistrate and obtained two warrants of arrest. As Justice Brennan stated in his dissenting opinion in *Abel v. United States*, 362 U.S. 217, 249 (1960):

... The issuance of these warrants is by no means automatic—it is controlled by a constitutionally prescribed standard. It thus could be held that sufficient protection was given the individual without the execution of a second warrant for the search.

See also *Di Bella v. United States*, 284 F.2d 897 (1960) (Dissenting opinion of Waterman, J. at 908). *But see*, Comment, 28 U. Chi. L. Rev. 664, 687, 688 (1961) (Discussing the distinction between the requisite probable cause for an arrest warrant and that required for a search warrant). In *Hayden* there was no prior preparation for the search and no warrants of any kind were issued before it. The search followed hard upon an emergency call. Haste and confusion were the order of the day and the limits of the search were left to the unfettered collective discretion of a half a dozen or more Baltimore policemen.

(3) Instead of a four room, one level apartment, which was the case in *Harris*, the search here covered an entire three story house. Here we have a "cellar" and a "garret" in reality as well as in rhetoric, and this expanded area adds to the total atmosphere of the search. It is most clearly relevant to the amount of control Hayden had over the area searched. To say that he had any control whatever over the basement of his home while he was in custody upstairs in his bedroom dressed in a T-shirt and skivvy shorts and surrounded by policemen is patently absurd.

B. Harris v. United States, 331 U.S. 145 (1947), should be reconsidered now.

It is commonplace to observe that one of the fundamental objectives of the Fourth Amendment is to eliminate exploratory searches. *Gouled v. United States*, 255 U.S. 298 (1921); *United States v. Lefkowitz*, 285 U.S. 452 (1932). The so-called "mere evidence" rule at least in part represents an attempt to implement this objective. Comment, 27 La. L. Rev. 53, 68-9, 71-2 (1966). Comment, 20 U. Chi. L. Rev. 319, 327 (1953).

Yet it is perhaps better, as petitioner states in his brief at p. 11, that "if it is desired to limit exploratory searches this should be done by attacking the problem directly." Respondent entirely agrees with this statement, and offers both that the *Harris* case is the appropriate place at which to begin such an attack and that now is the appropriate time.

Unfortunately the precedent set by the *Harris* case has caused confusion. Indeed there has been a tendency on the part of lower state and federal courts to use *Harris* in an automatic, unthinking fashion to justify the worse

kinds of ransacking, exploratory searches. See *Gentry v. United States*, 268 F.2d 63 (4th Cir. 1959) (Search of garage upheld where arrest occurred in the house); *Leahy v. United States*, 272 F.2d 487 (9th Cir. 1959) (Search of entire house upheld where police had probable cause to believe instrumentalities might be concealed in any room of house); *Miller v. United States*, 354 F.2d 801 (8th Cir. 1966) (Over 8 police officers arrested defendant for abortion; searched entire house. Diaries seized admitted in conviction for income tax evasion); *People v. Brinn*, 32 Ill.2d 232, 204 N.E.2d 724 (1965), *cert. denied; sub. nom., Clements v. Illinois*, 382 U.S. 827 (1965) (Search warrants for eight homes held invalid; evidence seized admitted as incident to a lawful arrest); *People v. Boozer*, 12 Ill.2d 184, 145 N.E.2d 619 (1957) (Defendant arrested on front porch; search of entire house upheld); *People v. McGowan*, 415 Ill. 375, 114 N.E.2d 407 (1953) (Defendant arrested on stairs outside apartment; search of entire apartment upheld).

It is a small wonder in this context that the search warrant is becoming a rarity. In his book, *Search and Seizure and The Supreme Court* (Johns Hopkins Press, 1966), Jacob W. Landynski states at 116:

That the Court's permissive attitude has indeed resulted in the framers' command being "set at naught" is evident from current practice. In this area, as in so many others, the state courts have followed the Supreme Court's lead. Abundant evidence exists that, at least on the state level, "the search warrant is a rarity." To give one example, in the thirty-year span between 1931 and 1962 the Los Angeles County Municipal Court issued exactly 538 search warrants. Yet during the

same period this court disposed of half a million felony cases.

Indeed the recent meticulous efforts of this Court to establish meaningful guidelines for the issuance of valid search and arrest warrants takes on increasing irony as the use of warrants by police diminishes. See, *e.g.*, *Jaban v. United States*, 381 U.S. 214 (1965); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Giordinello v. United States*, 357 U.S. 480 (1958). See also, *Stanford v. Texas*, 379 U.S. 476 (1965).

The unhappy facts are that it is all too easy for the police to manipulate an arrest to occur at a place they would like to explore. And in many cases the lower state and federal courts are sanctioning this technique. See *People v. Ghimenti*, 232 Cal. App.2d 76; 42 Cal. Rptr. 504 (1965) (Police informed defendant possession of firearms was outstanding. Two weeks later executed arrest warrant in defendant's home, searched for two hours and seized narcotics. Search and seizure upheld); *Collins v. Klinger*, 332 F.2d 54 (9th Cir. 1964), *cert. denied*, 379 U.S. 906 (1964) (Three month old arrest warrant used to arrest defendant in home and search entire two story house. Search and seizure upheld). *But see*, *McKnight v. United States*, 183 F.2d 977 (D.C. Cir. 1950) (Police repeatedly trailed "bag-man" for numbers operation but did not arrest him until he entered his home. Incident to arrest the police searched the entire house. Held: Evidence seized inadmissible—arrest was a pretext for a search of the house).

Undoubtedly disturbed by the growing difficulties of the *Harris* doctrine, Justice Frankfurter, writing for the majority in *Abel v. United States*, 362 U.S. 217 (1960), ex-

pressed dismay and dissatisfaction with this Court's decisions concerning search incidental to legal arrests and culminating in *Harris*. At the conclusion of this review he invited the Court's reconsideration of the whole field when the point was raised in the proper case:

We take as a starting point the cases in this Court dealing with the extent of the search which may properly be made without a warrant following a lawful arrest for crime. The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare *Marron v. United States*, 275 U.S. 192, with *Go-Bart Co. v. United States*, 282 U.S. 344, and *United States v. Lefkowitz*, 285 U.S. 452; compare *Go-Bart*, *supra*, and *Lefkowitz*, *supra*, with *Harris v. United States*, 331 U.S. 145, and *United States v. Rabinowitz*, 339 U.S. 56; compare also *Harris*, *supra*, with *Trupiano v. United States*, 334 U.S. 699, and *Trupiano* with *Rabinowitz*, *supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests. In view of their judicial context, the trial judge and the Government justifiably relied upon these cases for guidance at the trial; and the petitioner himself accepted the *Harris* case on the motion to suppress, nor does he ask this Court to reconsider *Harris* and *Rabinowitz*. It would, under these circumstances, be unjustifiable retrospective lawmaking for the Court in this case to reject the authority of these decisions. 362 U.S. 235, 236.

As additional proof of the fact that *Harris* has become little more than a rubber stamp of approval for the exploratory ransacking of private homes, one need look no further than the use of *Harris* in this very case. In spite of the differences set out above between this case and *Harris*, the Circuit Court dismissed the matter summarily, saying at p. 137 of the Record:

In its extent the search did not exceed the broad limits tolerated in *Harris v. United States*, 331 U.S. 145 (1947), where the Supreme Court affirmed the validity of an intensive five-hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest.

The District Court took an equally cursory approach to the problem (R. 44).

Indeed petitioner at p. 11 of his brief expands the sweep of *Harris* even further:

... Exploratory searches incident to a lawful arrest are condoned, if items technically classified as means, fruits or contraband are discovered, even if they relate to another crime other than the one for which an accused is subject to arrest.⁶

⁶ *Harris v. United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947).

If *Harris* is to be so understood, it is no wonder that the Baltimore police look for everything they can find!

Without doubt the case now before the Court is the proper vehicle for review of the *Harris* doctrine. To permit the police, as they always do according to the testimony in

this case (R. 112), to roam at will throughout the house, looking "everywhere" for "whatever we would find" (R. 112), amounts to no more than a license to explore. It is therefore apparent that if the search of the respondent's house by the Baltimore police is upheld by this Court under the authority of *Harris*, these cases will stand for the unqualified proposition that the Fourth Amendment permits the police, after arresting a man in his home, to rummage at will throughout the entire house, from "cellar to garret," in every nook and cranny, in search of *whatever* can be found which will convict him of *any* crime.

This broad authority which would look neither to the physical limits of the area searched, to the intensity of the search, nor to the intent of the officer in making the search is indeed the ultimate distortion, or more properly put, the complete destruction, of the original concept that searches without warrants should be narrowly confined to exceptional circumstances. *Weeks v. United States*, 232 U.S. 383 (1914); *Agnello v. United States*, 269 U.S. 20 (1925); *Marion v. United States*, 275 U.S. 192 (1927).

Before discussing the "mere evidence" rule, counsel for respondent would like to point out that, since the best rationale for the Rule has always been to limit exploratory searches, should this Court set realistic controls on exploratory searches by dealing with *Harris* directly, then the significance of its consideration of the mere evidence rule will decrease greatly. However, should this Court approve the search made here in the name of *Harris* then the last protection against the general search for evidence is the "mere evidence" rule.

II.

This Court Should Not Permit the Seizure of Items of Evidential Value Only Unearthed During the Course of an Intensive Exploratory Search.

The Rule and Its Origin—Numerous opinions emanating from this Court have clearly established the principle that items of evidential value only are by their very nature not subject to seizure. *Boyd v. United States*, 116 U.S. 616 (1886); *Gouled v. United States*, 255 U.S. 298 (1921); *Marron v. United States*, 275 U.S. 192 (1927); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Davis v. United States*, 328 U.S. 582 (1946); *Zap v. United States*, 328 U.S. 624 (1946); *Harris v. United States*, 331 U.S. 145 (1947); *On Lee v. United States*, 343 U.S. 747 (1952). See also article entitled *The Federal Search and Seizure Exclusionary Rule, Its Origin, Development, Present Status and Trend*, 45 *Journal of Criminal Law, Criminology and Police Science*, 51 (1954). A reading of these cases leaves no doubt whatever that the mere evidence rule is based on constitutional grounds. Petitioner's use of the original version of the Fourth Amendment and the Espionage Act of 1917, 40 Stat. 228, the forerunner to Fed. R. Crim. P. 41(b), to show that the Rule is of less than constitutional dimensions is not persuasive.

It is true that the first draft of the Fourth Amendment contained but one clause which dealt with search warrants. But the Amendment, as finally enacted has two clauses, the second deals with search warrants and the first protects the people against searches and seizures which are un-

reasonable in themselves. The importance of there being two clauses, which petitioner apparently has not realized, is clearly set forth in Lasson, *The History and Development of the Fourth Amendment* (1937) at 103.

[T]he reason behind the present phraseology is still important. As reported by the Committee of Eleven . . . the Amendment was a one-barreled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. That Benson interpreted it in this light is shown by his argument that although the clause was good as far as it went, *it was not sufficient*, and by the change which he advocated to obviate this objection. The provision as he proposed it [and as it now is] contained two clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against "unreasonable searches and seizures" was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment. [Emphasis in the original, footnotes omitted.]

See also *Lopez v. United States*, 373 U.S. 427, 454-55 (1963) (Brennan dissenting); Landynski, *Search and Seizure and the Supreme Court* (Johns Hopkins Press, 1966).

With regard to the origin of the Espionage Act of 1917, the following explanation is offered by Osmond K. Fraenkel at 34 Harv. L. Rev. 361, 380 (1921):

Before the enactment of this law the use of search warrants had been limited to revenue, counterfeiting and a few other classes of cases. The Act provides that search warrants may be issued under one of three contingencies: (§1) "when the property was stolen or embezzled"; (§2) "when the property was used as the means of committing a felony"; (§3) "when the property, or any paper, is possessed, controlled or used in violation of" federal penal statute.

It is significant that Congress did not authorize a search for evidence, and in view of the circumstances under which the act was passed, it is safe to assume that Congress did not believe that it had constitutional power to do so. It is also worthy of note that this act is in effect a reproduction of the provisions long existing in the State of New York, which had been declared an embodiment of the historical doctrine.

For further evidence that Congress considered the Act to be all that was permitted by the Constitution, see 55 Cong. Rec. 1838-39 (1917) and H. R. Rep. No. 65, 65th Cong., 1st Sess. 20 (1917).

Since "the standard of reasonableness is the same under the 4th and 14th Amendments", *Ker v. California*, 374 U.S. 23, 33 (1963) (statement approved by eight Justices), the Rule is therefore clearly applicable to the states. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Furthermore, from reading the old English case of *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765),

it is apparent that searches for items of evidential value only were not allowed at English common law. In that case the court was required to examine the common law to see if it permitted a general exploratory search and seizure of Entick's papers in the absence of a specific enabling act passed by Parliament. Such an Act had long been in effect but had expired shortly before the Entick search. The government in attempting to show that the common law permitted such a search, said that it was analogous to a search for stolen goods, which was allowed. The Court rejected the analogy. Certainly, if there had been a common law right to search for evidence at the time, the government would have used it as an analogy for obvious reasons.³

The Policy Basis

There are several rationales which are offered as justification for the Rule. The first of these is the protection it gives against self-incrimination. There can be no question that the Fifth Amendment has played a measurable role in the development of the Rule. *Boyd v. United States*, 116 U.S. 616 (1886), is the first case in which this court dealt with the mere evidence rule. The case involved the is-

³ The Solicitor General suggests in his brief that there apparently was no means of procuring the return of property seized by government officials at the time of *Entick v. Carrington*. According to Blackstone's *Commentaries*, however, at least two methods appear to have been available.

The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By petition *de droit*, or petition of right . . . 2. By *monstrans de droit*, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer . . . and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Blackstone, III *Commentaries* 255-56 (16th ed., London, 1825).

suance of a *subpoena duces tecum* for private papers. In holding the papers inadmissible this Court stated that here "the Fourth and Fifth Amendments run almost into each other". 116 U.S. at 630.

Since we are confronted in this case with the seizure of articles of clothing, this Court's recent opinion in *Schmerber v. United States*, 384 U.S. 757 (1966), is highly relevant in considering the degree of Fifth Amendment protection afforded respondent. Although we agree with Justice Black that the words "testimonial or communicative" are not models of clarity and that their use in determining Fifth Amendment application is fraught with danger, we must reluctantly concede that if a person's blood is not within the protection of the Fifth Amendment, his clothing probably is not either. We hasten to add that we vigorously contest the petitioner's attempt to extend *Schmerber* to remove respondent's Fourth Amendment protection in this case and we will discuss this contention later in the brief.

Although respondent does not consider this rationale nearly so important as privacy considerations, to be discussed next, property concepts have been suggested as a basis of the mere evidence rule. See Note, 54 Geo. L. Rev. 593, 622 (1966). Property does perform the important function of maintaining the independence and dignity of the individual in modern society by drawing a line between public and private power. See Reich, *The New Property*, 73 Yale L. J. 733, 771 (1964). We ask only that if a man's property is neither a crime to possess nor designed for committing crime that he be allowed to keep it and that his home be secure from entry for the purpose of seizing it. It is in the public interest that a man's feelings and individual sovereignty be recognized to this extent.

A third policy basis behind the Rule, and the one which is by far the most important, has been summarized very well by Judge Learned Hand in *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930):

[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, *limitations upon the fruit to be gathered tend to limit the quest itself* * * *. (Emphasis added.)

The Court should note carefully that this concept is strictly Fourth Amendment in orientation. It is designed to protect against searches for any and all kinds of evidence by the police. This Fourth Amendment policy is particularly cogent with regard to searches conducted incidental to a legal arrest, since the requirements of probable cause and particularity for obtaining a search warrant afford much of the necessary protection from indiscriminate searches for evidence. It is hardly surprising that most of the cases before this Court involving the mere evidence rule have also involved exploratory searches. See e.g. *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); see Solicitor General's Brief p. 36. Therefore, because the facts of this case deal with a search incidental to an arrest, this analysis will proceed from that point.

Schmerber v. United States, 384 U.S. 757 (1966), does not foreclose the application of the Fourth Amendment in the present context. This Court in its discussion there set up three categories of searches: (1) from the home, (2) from the person after a legal arrest, and (3) by intrusion into the human body.

Regarding the third category the Court noted it was writing on a "clean slate". 384 U.S. at 768. In discussing the petitioner's Fourth Amendment claim the Court stated:

Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—"houses, papers, and effects"—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant¹⁰ . . . are not instructive in this context 384 U.S. at 767-768. [Emphasis added.]

¹⁰ See, e.g., *Gouled v. United States*, 255 U.S. 298. . . .

Petitioner's attempt to overcome the Court's statement in this regard by converting human blood into saleable property is not effective, and it is clear that the Court's *Fourth Amendment* holding in *Schmerber* simply is not applicable to this case.

Although petitioner continues to lump searches of a home with searches of the person after legal arrest, *Schmerber* clearly points out the important distinction between the two. The opinion recognizes that as early as *Weeks v. United States*, 232 U.S. 383 (1914), police officers were permitted to seize fruits or evidences of crime from the person after a legal arrest. *Schmerber v. United States*, 384 U.S. 757, 769. The reason for this permissive approach is that

danger to the arresting officer and danger of destruction of evidence under the direct control of the accused justifies a complete search of the accused's person. *This search must necessarily be exploratory in nature.* Once such a search of an arrested person is permitted, it becomes impractical and unnecessary to the enforcement of the Fourth Amendment's purpose to attempt to confine the search. His personal privacy has been completely invaded by the arrest and necessarily exploratory search of his person. But this does not mean that his entire home necessarily be subjected to the same indignity. The distinction is effectively set out by Judge Learned Hand in *United States v. Kirschenblatt*, 16 F.2d 202, 203 (1926):

Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent. The second is a practice which English-speaking peoples have thought intolerable for over a century and a half. It was against general warrants of search, whose origin was, or was thought to be, derived from Star Chamber, and which had been a powerful weapon for suppressing political agitation, that the decisions were directed, of which *Entick v. Carrington*, 19 How. St. Trials, 1029, is most often cited. These cases were decided just after the colonists had been hotly aroused by the attempt to enforce customs duties by writs of assistance, and when within 30 years they framed the Fourth Amendment it was general warrants that they especially had in mind. *Boyd v. United States*, 116 U.S. 616

After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.

See also *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923); *Harris v. United States*, *supra*, 164.

Probably recognizing the weakness of his argument that *Schmerber* has removed Fourth Amendment support from the Rule and it applies to searches of premises, petitioner contends in the alternative that the Rule was never meant to apply to non-documentary evidence but only to documentary evidence. (Petitioner's Brief pp. 20-23.) Attempting to counter the opinion of the court below which stated that there was "no rational distinction between private papers that are of only evidential value and articles of clothing of the same character" (R. 142) for purposes of applying the Rule, the petitioner contends that there is a "rational dis-

inction" between such types of evidence which permits the seizure of one but not the other. This distinction is said to rest on the *Fourth Amendment*, the reasoning being that a search for inculpatory private papers will inevitably result in an exploratory search (Petitioner's Brief p. 20 citing *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185, 191-192 (1965)). Having purported to remove Fourth Amendment support, the petitioner then leaves the Rule, as it applies to non-documentary evidence, now standing one-legged upon the *Fifth Amendment*. This prop he neatly kicks away with a cite to *Schmerber* (Petitioner's Brief pp. 21, 22).

The respondent fails to see how a search for papers is any more conducive to an exploratory search than is a search for non-documentary objects small in size which could be effectively concealed anywhere in a man's home. As a justification for limiting the Rule to documentary evidence the petitioner's thesis is simply illogical. A key or other small item of non-documentary evidence could easily be secreted in a desk drawer filled with private documents or for that matter between the pages of a book or diary.

Not only would such a limitation of the Rule on the above ground be illogical but it would totally fail to take account of the plain language of the *Fourth Amendment* which guarantees that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

The petitioner also fails to explain how, if such a "rational distinction" exists, the *Fourth Amendment* permits the seizure of documentary as well as non-documentary evidence from the person of the accused following his law-

ful arrest, i.e. the telegram seized from Hayden's person after his arrest (R. 110).

Furthermore, there is no question but that documentary evidence is properly seizable under the Fourth Amendment if it falls into one of the acceptable categories: (1) possession of item seized a continuing crime. *Harris v. United States*, 331 U.S. 145 (1947) (false selective service cards); *United States v. Rabinowitz*, 339 U.S. 56 (1950) (573 forged and altered United States stamps). (2) Item being used as a means of committing a felony. *Marron v. United States*, 275 U.S. 192 (1927) (ledger book in illegal saloon part of outfit actually used to commit offense); *Zap v. United States*, 328 U.S. 624 (1946) (\$4,000.00 expense check presented to Government in claim for reimbursement under cost plus fixed fee contract, when expense actually incurred had been only \$2,500.00). (3) Item a "public" document subject to inspection by public authorities. *Davis v. United States*, 328 U.S. 582 (1946) (gasoline ration coupons); *Harris v. United States*, *supra* (selective service cards).

As this court stated in *Gould v. United States*, 255 U.S. 298, 309 (1921); the very case credited with having first articulated the mere evidence rule:

There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant.

We have therefore shown that the mere evidence rule is grounded in Fourth Amendment considerations and does have a functional role to play in limiting searches of a

home incidental to a legal arrest. The function may properly be examined by this Court in its cumulative effect on searches and seizures. *Linkletter v. Walker*, 381 U.S. 61 (1965). And the fact that the Rule might effect a particular search only negligibly should not be of great concern to the court. The long term effect of the Rule will be to prevent exploratory searches of homes for evidences of crimes. It will force the police to *think* of what they're searching for before they start to search.

Petitioner cites *Miranda v. Arizona*, 384 U.S. 436 (1966), and also the Court to encourage "scientific investigation" (Pet. Brief pp. 38-39). If the ransacking of a man's home for all the evidence you can find against him is scientific investigation, it sounds like a poor alternative to the coerced confession!

Plausible Modifications of the Rule

Counsel for respondent is, of course, aware of the clamor which has arisen recently in connection with the mere evidence rule. *People v. Thayer*, 47 Cal. Rptr. 780, 408 P.2d 108 (1966), *cert. den.* 384 U.S. 908 (1966); *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965). Comment, *Eavesdropping Orders and the Fourth Amendment*, 66 Colum. L. Rev. 355 (1966); Comment, 4 Duquesne L. Rev. 582 (1965); Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361 (1921); Note, *Evidentiary Searches: The Rule and the Reason*, 54 Geo. L.J. 593 (1966); Kamisar, *Public Safety v. Individual Liberties: Some "Facts and Theories"*, 53 J. Crim. L., C. & P. S. 171 (1962); Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474 (1961); Comment, 27 La. L. Rev. 53 (Dec., 1966); Manwaring, *California and the Fourth Amendment*,

16 Stan. L. Rev. 318, 327-28 (1964); Nedrud, *The Criminal Law* 1967, Sample Section (Oct., 1966); Comment, 54 Nw. U. L. Rev. 611 (1964); Comment, *Search and Seizure of "Mere Evidence"—Amendment to Ore. Rev. Stat. Sec. 141.010—Effect on Prior Law and Constitutionality*, 43 Ore. L. Rev. 333 (1964); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 Ind. L.J. 259 (1950); Note, 2 San Diego L. Rev. 101 (1965); Shellow, *The Continuing Vitality of the Gouled Rule: The Search For and Seizure of Evidence*, 48 Marq. L. Rev. 172 (1964); Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship"*, 13 U.C.L.A. L. Rev. 857 (1966); Comment, *Limitations on the Seizure of "Mere Evidentiary Objects"—A Rule in Search of a Reason*, 20 U. Chi. L. Rev. 319 (1953).

As petitioner points out (Pet. Brief pp. 44-49) the area that has caused much of the difficulty and confusion in the application of the Rule has been in the definition of an instrumentality. In their eagerness to avoid the Rule, prosecuting authorities have strained and distorted the concept of a criminal instrumentality to squeeze evidentiary items into a seizable category. See, e.g., *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958). See also, Note, *Evidentiary Searches: The Rule and the Reason*, 54 Geo. L. Rev. 593, 609-610 (1966). In a few cases the courts have employed these strained concepts in their opinions. See for example, *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958), cert. denied, 356 U.S. 950 (1958). Respondent contends most earnestly that this confusion would be substantially compounded if this Court should hold that ordinary clothing is to be classified as an instrumentality of crime. Indeed petitioner puts forward as a reason for abandoning

the Rule the fact that some courts are "technically" considering clothing as instrumentalities of crime, while others are not, thereby causing confusion. Respondent contends that this confusion can be dealt with much more directly by this Court making the common sense decision that ordinary clothing used in an ordinary way simply is not to be considered an instrumentality of crime.⁴

However, respondent recognizes that criticism of the Rule is not limited to confusion caused by misapplication of the instrumentality exception. It may be, therefore, that the Court will wish to modify the Rule to preserve its functional role in protecting Fourth Amendment rights while shearing away some of its less defensible technicalities. It is for this reason that respondent includes the following discussion in his brief.

Searches conducted under the authority of a valid search warrant specifically describing the items of evidential value only to be seized—This is the major concern of the Solicitor General of the United States is his *amicus curiae* brief. As he points out, in certain circumstances Fifth Amend-

⁴ At this point a comment concerning the cases cited at pp. 37-38 of the Solicitor General's is required. Although these cases are included in a section dealing ostensibly with the instrumentality exception, only one of the eight cases cited, *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958) deals with that topic. The others are simply not in point:

Margeson v. United States, 361 F.2d 327 (1st Cir. 1966), *cert. den.*, 385 U.S. 830; *United States v. Caruso*, 358 F.2d 184 (2d Cir. 1966), *cert. den.*, 385 U.S. 862; *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. 1965), *cert. den.*, 382 U.S. 862; *Robinson v. United States*, 283 F.2d 508 (D.C. Cir. 1960), *cert. den.*, 364 U.S. 919; and *Charles v. United States*, 278 F.2d 386 (9th Cir. 1960), *cert. den.*, 364 U.S. 831; all deal with seizures from the person after a legal arrest. And in *Morton v. United States*, 147 F.2d 28 (D.C. Cir. 1945), *cert. den.*, 324 U.S. 875 counsel for the defendant waived the point.

ment problems may be raised. However, assuming they are not, should the Court wish to modify the Rule, this would certainly be the place to start. For the search warrant would afford the necessary protection against unfettered police discretion to rummage at will for evidence. Of course, the facts of the present case are far removed from this hypothetical situation, such a modification would have no bearing on respondent's position.

The strong policy reasons for not modifying the Rule further are so well set out in a recent article in 27 La. Law Rev. 53, 69-72 (1966) that they are quoted here.

Searches Under Warrant Not Specifying the Mere Evidence Seized—When the entry is under a lawful search warrant, but the mere evidence seized is not specified in that warrant, two theories support finding the seizure illegal. One can hold the seizure invalid on the ground that the specificity clause of the fourth amendment prohibits any "seizure of one thing under a warrant describing another." This seems to be the position taken by the Supreme Court in *Marron v. United States*.⁹⁰ If that approach is taken, there is, of course, no need for the mere evidence rule. However, another Supreme Court case⁹¹ has been read to mean that an officer who enters under a lawful search warrant may seize other things that he happens upon in the normal course of his search.⁹² Recently the Supreme Court ex-

⁹⁰ 275 U.S. 192 (1927).

⁹¹ *Steele v. United States*, 267 U.S. 498 (1925).

⁹² In *Steele* a warrant was issued authorizing the seizure of whisky, and other intoxicating liquors were seized, and the Court upheld the seizure. Judge Learned Hand, in *United States v. Kirschenblatt* interpreted *Steele* to mean that "officers, once in under a search warrant, are not confined to the contraband specified in it." 16 F.2d 202, 203 (1926).

pressly reserved decision on the question whether contraband may be seized in the course of a search under a warrant not specifying it.⁹³ Several appellate courts have held that there are circumstances in which things not specified in the warrant may be seized.⁹⁴ One of these cases quoted the statement of the mere evidence rule in *Harris v. United States* as controlling.⁹⁵

If seizure of something not specified in the search warrant is allowed, the fourth amendment and *Gouled* should limit the kinds of things seizable. *Gouled* itself applied the mere evidence rule in those circumstances. Some limitation is necessary to prevent a special search from changing into a general one; not applying the *Gouled* rule would greatly weaken the specificity requirement.

Warrantless Searches—Policy underlying the fourth amendment requires that the *Gouled* rule bar the seizure of all mere evidence where the search is incidental to an arrest, or otherwise without a search warrant, unless the mere evidence is found on the arrestee's person. The specificity requirement of the fourth amendment cannot protect the individual's privacy from intrusion by the police where there is no warrant to contain the specification. Searches without a warrant should not give the police any greater power than searches with a warrant. Without the mere evidence rule to substitute for the specificity requirement, the

⁹³ *Stanford v. Texas*, 379 U.S. 476, 486 (1965).

⁹⁴ *Porter v. United States*, 335 F.2d 620 (9th Cir. 1964); *United States v. Eisner*, 297 F.2d 595 (6th Cir. 1962).

⁹⁵ *United States v. Eisner*, 297 F.2d 595, 597 (6th Cir. 1962).

police would have greater power to search and seize without a warrant than with one.⁹⁶

If the seizure of mere evidence in a warrantless search were allowed, police officers would be encouraged to bypass the procedural difficulties of obtaining a search warrant by arresting the accused on the premises which they wish to search. Application to such searches of the rule barring the seizure of all mere evidence would encourage the police to obtain warrants. The individual's privacy would be better protected if the practice of obtaining search warrants was thus encouraged.

⁹⁶ In *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932), the Court stated: "[T]he authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained."

III.

Failure by Trial Counsel to Object in This Case to the Admission Into Evidence of the Items Seized During the Search of the Respondent's Home Did Not Forfeit His Right to Assert His Constitutional Claims Before This Court.

In order to preclude consideration of the respondent's constitutional claims on federal habeas corpus in the court below the petitioner must have shown that Hayden, acting through his attorney, deliberately and knowingly bypassed state court procedure in failing to object and that the failure to object constituted an independent and adequate state ground. *Henry v. Mississippi*, 379 U.S. 443,

452 (1965); *Fay v. Noia*, 372 U.S. 391, 438-39 (1963). This the petitioner failed to do.

A. *Failure to object to the admission into evidence of items seized in the search of the respondent's home did not constitute a deliberate by-pass of state court procedure.*

In *Henry v. Mississippi, supra*, there had been a failure by trial counsel to make contemporaneous objection to the admission of certain evidence. On direct appeal this Court remanded the case for a hearing on the question of whether the failure to object was a conscious, strategic or tactical maneuver on the part of trial counsel which would constitute a deliberate by-pass of state court procedure, or whether the failure to make contemporaneous objection resulted merely from oversight or ignorance on the part of trial counsel. In remanding the Court stated at 452:

We think [this] course is particularly desirable here, since a dismissal on the basis of an adequate State ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which *the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately by-passed the orderly procedure of the state courts.* *Fay v. Noia, supra*, 372 U.S. at 438, 83 St. Ct. at 848 (emphasis added).

The record in this case presents uncontradicted testimony as to the reasons for trial counsel's failure to object to the admission into evidence of the articles seized in the search of the respondent's home. In the habeas corpus hearing in the United States District Court for the District of Mary-

land, Mr. Freedman, respondent's trial counsel testified as follows:

Q. . . . I would like to know in your opinion, sir, why no objection was made to the admissibility of the matters seized at Mr. Hayden's home when they were sought to be introduced by the State at the time of the trial?

A. (By trial counsel) I think I can answer that. The reason for that was that Mr. Hayden's defense solely was that of mistaken identity; he was the wrong man, and in my opinion it was a sufficient case of good and probable cause for the arrest and the search and seizure, and from the standpoint of its legality I felt that the arrest and search and seizure were good and sufficient law.

* * * * *

Q. Did you feel that everything that was seized in his home, Mr. Freedman, would necessarily become admissible at the trial of this case?

A. It could or could not be depending upon the Court's ruling, how the Court felt about it.

Q. Why did you not enter an objection to it?

A. I didn't enter an objection because I thought it was properly, it was proper evidence to be admitted (R. 89, 90).

Petitioner's contention that trial counsel's failure to object was prompted by "two strategic reasons" (Petitioner's Brief pp. 60-62) simply lacks any support in the record or in logic. This contention is based entirely on conjecture and well deserves the summary treatment accorded it by the court below. (See R. 134). The *sole* reason for

trial counsel's failure to object to the admission into evidence of these articles was his ignorance as to the law governing their admissibility (R. 89, 90). In this area of the law, hardly noted for its clarity or certitude, such an error by trial counsel cannot be considered a deliberate by-pass of state court procedure as set out in *Henry v. Mississippi*, *supra* and *Fay v. Noia*, *supra*.

B. *By ignoring the failure to object and proceeding to a determination of the merits of respondent's federal question, the Court of Appeals of Maryland has declined to invoke an independent state ground.*

The court below found it unnecessary to consider whether the respondent had deliberately by-passed state court procedure since the Court of Appeals of Maryland ignored the failure to object and remanded the case to the lower state court for a determination of the legality of the search and seizure (R. 135).

When the highest court of a state has declined to invoke an independent state ground and has proceeded to the merits of a federal question, it would be incongruous for a federal court to assert the state ground to shut off its review of the federal question. There appears to be no reason for a federal court to refuse to vindicate a federal claim by a more exacting insistence on state procedural requirements than the state court itself demanded. The so-called independent ground, not having been relied on by the state, is simply irrelevant (R. 135).

Petitioner is of the view, however, that: (1) The Court of Appeals of Maryland did not decline to invoke an inde-

pendent state ground, it merely failed to do so due to its lack of knowledge as to whether an objection to admissibility was made at trial. (2) It is the duty of a federal court to impose a forfeiture of a federal claim (thereby vindicating a legitimate state interest) when the state has chosen not to protect such an interest.

As to the first view, petitioner asserts that since the Court of Appeals of Maryland did not have the transcript of Hayden's trial it did not know whether or not objection had been raised at trial. Consequently, it remanded so that "*a Townsend v. Sain* type hearing be held to determine factually whether or not the contemporaneous objection rule was applicable." (Petitioner's Brief p. 57). This view is not only illogical but squarely contradicts the plain language of the Court of Appeals of Maryland in its Mandate remanding the case to the post conviction judge.

Instead of ascertaining whether in fact there had been an illegal search and seizure . . . the hearing judge summarily disposed of the matter by stating that *the question should have been raised at the trial and was not a ground for post conviction relief.* (Emphasis added.)

Hayden v. Warden of the Maryland Penitentiary, 233 Md. 613, 614, 195 A.2d 692 (1963).

There can be no question that prior to its remand for a determination of the merits of the respondent's federal claim the Court of Appeals *knew* that no objection had been raised at trial, yet chose to ignore this procedural defect. There can be no question that it remanded for a determination of the merits of respondent's constitutional claim that he was a victim of an illegal search and seizure. This, in fact, was the reading of the Mandate by the post conviction judge (R. 26).

As to the second view, under the holding of *Fay v. Noia*, 372 U.S. 391 (1963), a federal court does not have discretion to impose a forfeiture of a federal claim on the basis of a failure to follow state procedure unless the state has refused to consider the federal claim.

We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.* (Emphasis added.) 372 U.S. at 438.

If a habeas applicant . . . forewent the privilege of seeking to vindicate his federal claims in the state courts [for] . . . any . . . reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief *if the state courts refused to entertain his federal claim on the merits.* . . . (Emphasis added.) 372 U.S. at 439.

In this case the Court of Appeals of Maryland ordered that respondent's federal claim be determined on the merits by the state post conviction judge (R. 26).

While it is clear that a state court's finding of waiver of a federal claim will not bar a federal court from redetermining the question, it is equally clear that a federal court cannot impose a forfeiture of a federal claim (thereby protecting a legitimate state interest) when the state by its conduct in the case has chosen not to protect this interest. If the Court of Appeals of Maryland chose not to insist upon adherence Maryland's contemporaneous objection rule (Md. Rules 522d2, 885) as a prerequisite to a state court determination of the respondent's federal claim, which it

did, then a federal court simply has no justification for insisting on it as a prerequisite to its hearing the claim.

The Ninth Circuit has held differently. In *Nelson v. California*, 346 F.2d 73, 82 (9th Cir. 1965), the court held that a state's willingness to pass upon a federal claim does not prevent a federal court from finding a deliberate by-pass, since "... the deliberate by-passing or waiver rule is not procedural; it is based upon a conscious choice, by the petitioner's counsel, when confronted with a procedural rule, rather than upon the rule itself." Judge Skelly Wright commented on the Ninth Circuit's holding as follows:

The court's position is that, since the waiver standard is federal, the state's decision does not bind federal courts whether that decision imposes or fails to impose a waiver. Logically, this reasoning is unassailable. And it may well be true that, where the habeas applicant actually waived some federal right under the *Johnson v. Zerbst* formula, federal courts should insist upon the waiver although the state court does not. But the deliberate bypass rule allows district courts to impose waivers of federal rights by inference from procedural defaults only in order to vindicate substantial interests preserved by state procedural rules imposing forfeitures of remedies. It makes no sense in light of this purpose to insist upon the imposition of a forfeiture because of noncompliance with a state rule when the state itself demonstrates that strict compliance with the rule involved is not necessary, at least in the particular case, to vindicate the interests the rule is designed to serve. A state's judgment that "a

suitor's conduct in relation" to some state procedure should not "disentitle him to the relief he seeks,"²³⁵ should be final.

²³⁵ *Fay v. Noia*, 372 U.S. 391, 438 (1963). In fact, *Noia* holds that the district courts have discretion to "deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Ibid.* (Emphasis added.)

Wright & Sofaer, *Federal Habeas Corpus for State Prisoners*, 75 Yale L.J. 895, 962 (1966).

The position of Judge Wright and of the court below finds explicit support in the holding of *Fay v. Noia* and is eminently reasonable in the context of habeas corpus where every reasonable presumption against a waiver of fundamental constitutional rights should be indulged.

Conclusion

For all the reasons stated above, the respondent respectfully submits that the search of his home was illegal, the seizure of evidentiary items improper, and their admission into evidence a violation of his constitutional rights. For these reasons the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

ALBERT R. TURNBULL
Counsel for Respondent

March 1967

APPENDIX

Statutes and Rules Involved

Federal Rules of Criminal Procedure:

Rule 41. Search and Seizure.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C. § 957.

Maryland Rules of Procedure:

Rule 522. Objection to Ruling or Order— Method of Making—General.

d. Objection to Evidence.

2. Time to Be Made—Waiver.

Every objection to the admissibility of evidence shall be made at the time when such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become apparent, otherwise the objection shall be treated as waived.

**Rule 885. Scope of Review—Limited to Questions
Decided by Lower Court.**

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

SUPREME COURT OF THE UNITED STATES

No. 480.—OCTOBER TERM, 1966.

Warden, Maryland Penitentiary, Petitioner, v. Bennie Joe Hayden.	}	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.
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[May 29, 1967.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We review in this case the validity of the proposition that there is under the Fourth Amendment a "distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."¹

A Maryland court sitting without a jury convicted respondent of armed robbery. Items of his clothing, a cap, jacket, and trousers, among other things, were seized during a search of his home, and were admitted in evidence without objection. After unsuccessful state court proceedings, he sought and was denied federal

¹ *Harris v. United States*, 331 U. S. 145, 154; see also *Gould v. United States*, 255 U. S. 298; *United States v. Lefkowitz*, 285 U. S. 452, 465-466; *United States v. Rabinowitz*, 339 U. S. 56, 64, n. 6; *Abel v. United States*, 362 U. S. 217, 234-235.

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habeas corpus relief in the District Court of Maryland.² A divided panel of the Court of Appeals for the Fourth Circuit reversed. 363 F. 2d 647. The Court of Appeals believed that *Harris v. United States*, 331 U. S. 145, 154, sustained the validity of the search, but held that respondent was correct in his contention that the clothing seized was improperly admitted in evidence because the items had "evidential value only" and therefore were not lawfully subject to seizure. We granted certiorari. 385 U. S. 926. We reverse.³

I.

About 8 a. m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some \$363 and

² Hayden did not appeal from his conviction. He first sought relief by an application under the Maryland Post Conviction Procedure Act which was denied without hearing. The Maryland Court of Appeals reversed and remanded for a hearing. 233 Md. 613, 195 A. 2d 692. The trial court denied relief after hearing, concluding "that the search of his home and seizure of the articles in question were proper." His application for federal habeas corpus relief resulted, after hearing in the District Court, in the same conclusion.

³ The State claims that, since Hayden failed to raise the search and seizure question at trial, he deliberately bypassed state remedies and should be denied an opportunity to assert his claim in federal court. See *Henry v. Mississippi*, 379 U. S. 443; *Fay v. Noia*, 372 U. S. 391. Whether or not the Maryland Court of Appeals actually intended, when it reversed the state trial court's denial of post-conviction relief, that Hayden be afforded a hearing on the merits of his claim, it is clear that the trial court so understood the order of the Court of Appeals. A hearing was held in the state courts, and the claim denied on the merits. In this circumstance, the Fourth Circuit was correct in rejecting the State's deliberate-bypassing claim. The deliberate-bypass rule is applicable only "to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." *Fay v. Noia*, *supra*, 372 U. S., at 438. (Emphasis added.) But see *Nelson v. California*, 346 F. 2d 73, 82 (C. A. 9th Cir. 1965).

ran. Two cab drivers in the vicinity, attracted by shouts of "Holdup," followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5'8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.⁴

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found a jacket and trousers of the type the fleeing man was said to have worn in a washing machine. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against respondent at his trial.

⁴ The state postconviction court found that Mrs. Hayden "gave the policeman permission to enter the home." The federal habeas corpus court stated it "would be justified in accepting the findings of fact made by Judge Sodaro on that issue . . .," but concluded that resolution of the issue would be unnecessary, because the officers were "justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery."

-II-

We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U. S. 451, 456. The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

We do not rely upon *Harris v. United States*, *supra*, in sustaining the validity of the search. The principal issue in *Harris* was whether the search there could properly be regarded as incident to the lawful arrest, since Harris was in custody before the search was made and the evidence seized. Here, the seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

It is argued that, while the weapons, ammunition, and cap may have been seized in the course of a search for weapons, the officer who seized the clothing was searching neither for the suspect nor for weapons when he looked into the washing machine in which he found the clothing. But even if we assume, although we do not decide, that the exigent circumstances in this case made lawful a search without warrant only for the suspect or his weapons, it cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons. He testified that he was searching for the man or the money, but his failure to state explicitly that he was searching for weapons, in the absence of a specific question to that effect, can hardly be accorded controlling weight. He knew that the robber was armed and he did not know that some weapons had been found at the time he opened the machine.⁵ In these circumstances the inference that he was in fact also looking for weapons is fully justified.

III.

We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are "mere evidence." The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or

⁵ The officer was asked in the District Court whether he found the money. He answered that he did not, and stated: "By the time I had gotten down into the basement I heard someone say upstairs, 'There's a man up here.'" He was asked: "What did you do then?" and answered: "By this time I had already discovered some clothing which fit the description of the clothing worn by the subject that we were looking for" It is clear from the record and from the findings that the weapons were found after or at the same time the police found Hayden.

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contraband has been criticized by courts⁶ and commentators.⁷ The Court of Appeals, however, felt "obligated to adhere to it." 363 F. 2d, at 655. We today reject the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment.⁸

We have examined on many occasions the history and purposes of the Amendment.⁹ It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of "the sanctity of a man's home and the privacies of life," *Boyd v. United States*, 116 U. S. 616, 630, from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all "unreasonable" searches and seizures, and by requiring the use of warrants, which particularly describe "the place to be searched, and

⁶*People v. Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, cert. denied, 384 U. S. 908; *State v. Bisaccia*, 45 N. J. 504, 213 A. 2d 185. Compare *United States v. Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930).

⁷*E. g.*, Chafee, *The Progress of the Law 1919-1922*, 35 Harv. L. Rev. 673 (1922); Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 Minn. L. Rev. 891, 914-918 (1960); Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474, 478 (1961); Comment, 45 N. C. L. Rev. 512 (1967); Comment, 66 Col. L. Rev. 355 (1966); Comment, 20 U. Chi. L. Rev. 319 (1953); Comment, 31 Yale L. J. 518 (1922). Compare, *e. g.*, Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361 (1921), Note, 54 Geo. L. J. 593 (1966).

⁸This Court has approved the seizure and introduction of items having only evidential value without, however, considering the validity of the distinction rejected today. See *Schmerber v. California*, 384 U. S. 757; *Cooper v. California*, — U. S. —.

⁹*E. g.*, *Stanford v. Texas*, 379 U. S. 476, 481-485; *Marcus v. Search Warrant*, 367 U. S. 717, 724-729; *Frank v. Maryland*, 359 U. S. 360, 363-365. See generally Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937); Landynski, *Search and Seizure and the Supreme Court* (1966).

the persons or things to be seized," thereby interposing "a magistrate between the citizen and the police," *McDonald v. United States*, *supra*, 335 U. S., at 455.

Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the "right of the people to be secure in their persons, houses, papers, and effects . . .," without regard to the use to which any of these things are applied. This "right of the people" is certainly unrelated to the "mere evidence" limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another. See Comment, 20 U. Chi. L. Rev. 319, 320-322 (1953).

In *Gouled v. United States*, *supra*, 255 U. S., at 309, the Court said that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding" The Court derived from *Boyd v. United States*, *supra*, the proposition that warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders posses-

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sion of the property by the accused unlawful and provides that it may be taken," 255 U. S., at 309; that is, when the property is an instrumentality or fruit of crime, or contraband. Since it was "impossible to say, on the record . . . that the Government had any interest" in the papers involved "other than as evidence against the accused . . .," "to permit them to be used in evidence would be, in effect, as ruled in the *Boyd Case*, to compel the defendant to become a witness against himself." *Id.*, at 311.

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U. S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The Fourth Amendment ruling in *Gouled* was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals. The common law of search and seizure after *Entick v. Carrington* reflected Lord Camden's view, derived no doubt from the political thought of his time, that the "great end, for which men entered into society, was to secure their property." 19 How. St. Tr. 1029, 1066. Warrants were "allowed only where the primary right to such a search and seizure is in the interest which the public or complainant may have in the property seized." *Lasson, op. cit. supra*, at 133-134. Thus stolen property—the fruits of crime—was always subject to seizure. And

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the power to search for stolen property was gradually extended to cover "any property which the private citizen was not permitted to possess," which included instrumentalities of crime (because of the early notion that items used in crime were forfeited to the State) and contraband. Kaplan, *op. cit. supra*, at 475. No separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted. The remedial structure also reflected these dual premises. Trespass, replevin, and the other means of redress for persons aggrieved by searches and seizures, depended upon proof of a superior property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized. As Lord Camden pointed out in *Entick v. Carrington*, *supra*, at 1066, a general warrant enabled "the party's own property . . . [to be] seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal."

The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. See *Jones v. United States*, 362 U. S. 257, 266; *Silverman v. United States*, 365 U. S. 505, 511. This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform. The remedial structure at the time even of *Weeks v. United States*, 232 U. S. 383, was arguably explainable in property terms. The Court held in *Weeks*

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that a defendant could petition *before* trial for the return of his illegally seized property, a proposition not necessarily inconsistent with *Adams v. New York*, 192 U. S. 585, which held in effect that the property issues involved in search and seizure are collateral to a criminal proceeding.¹⁰ The remedial structure finally escaped the bounds of common law property limitations in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, and *Gouled v. United States*, *supra*, when it became established that suppression might be sought during a criminal trial, and under circumstances which would not sustain an action in trespass or replevin. Recognition that the role of the Fourth Amendment was to protect against invasions of privacy demanded a remedy to condemn the seizure in *Silverthorne*, although no possible common law claim existed for the return of the copies made by the Government of the papers it had seized. The remedy of suppression, necessarily involving only the limited, functional consequence of excluding the evidence from trial, satisfied that demand.

The development of search and seizure law since *Silverthorne* and *Gouled* is replete with examples of the transformation in substantive law brought about through the interaction of the felt need to protect privacy from unreasonable invasions and the flexibility in rulemaking made possible by the remedy of exclusion. We have held, for example, that intangible as well as tangible evidence may be suppressed, *Wong Sun v. United States*, 371 U. S. 471, 485-486, and that an actual trespass under local property law is unnecessary to support a remediable violation of the Fourth Amendment, *Silverman v. United States*, *supra*. In determining whether someone is a "person aggrieved by an unlawful search and seizure" we have refused "to import into the law . . . subtle dis-

¹⁰ Both *Weeks* and *Adams* were written by Justice Day, and joined by several of the same Justices, including Justice Holmes.

tinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Jones v. United States*, *supra*, 362 U. S., at 266. And with particular relevance here, we have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at common law could be seized with impunity: stolen goods, *Henry v. United States*, 361 U. S. 98; instrumentalities, *Beck v. Ohio*, 379 U. S. 89; *McDonald v. United States*, *supra*; and contraband, *Trupiano v. United States*, 334 U. S. 699; *Aguilar v. Texas*, 378 U. S. 108.

The premise in *Gouled* that government may not seize evidence simply for the purpose of proving crime has likewise been discredited. The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction,¹¹ obscuring the

¹¹ At common law the Government did assert a superior property interest when it searched lawfully for stolen property, since the procedure then followed made it necessary that the true owner swear that his goods had been taken. But no such procedure need be followed today; the Government may demonstrate probable cause and lawfully search for stolen property even though the true owner is unknown or unavailable to request and authorize the Government to assert his interest. As to instrumentalities, the Court in *Gouled* allowed their seizure, not because the Government had some property interest in them (under the ancient, fictitious forfeiture theory), but because they could be used to perpetrate further crime. 255 U. S., at 309. The same holds true, of course, for "mere evidence"; the prevention of crime is served at least as much by allowing the Government to identify and capture the criminal, as it is by allowing the seizure of his instrumentalities. Finally, contraband is indeed property in which the Government holds a superior interest, but only because the Government decides to vest such an interest in itself. And while there may be limits to what may be declared contraband, the concept is hardly more than a form through which the Government seeks to prevent and deter crime.

reality that government has an interest in solving crime. *Schmerber* settled the proposition that it is reasonable, within the terms of the Fourth Amendment, to conduct otherwise permissible searches for the purpose of obtaining evidence which would aid in apprehending and convicting criminals. The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. Cf. *Kremen v. United States*, 353 U. S. 346. But no such problem is presented in this case. The clothes found in the washing machine matched the description of those worn by the robber and the police therefore could reasonably believe that the items would aid in the identification of the culprit.

The remedy of suppression, moreover, which made possible protection of privacy from unreasonable searches without regard to proof of a superior property interest, likewise provides the procedural device necessary for allowing otherwise permissible searches and seizures conducted solely to obtain evidence of crime. For just as the suppression of evidence does not entail a declaration of superior property interest in the person aggrieved, thereby enabling him to suppress evidence unlawfully seized despite his inability to demonstrate such an interest (as with fruits, instrumentalities, contraband), the refusal to suppress evidence carries no declaration of superior property interest in the State, and should thereby enable the State to introduce evidence lawfully seized

despite its inability to demonstrate such an interest. And, unlike the situation at common law, the owner of property would not be rendered remediless if "mere evidence" could lawfully be seized to prove crime. For just as the suppression of evidence does not in itself necessarily entitle the aggrieved person to its return (as, for example, contraband), the introduction of "mere evidence" does not in itself entitle the State to its retention. Where public officials "unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity . . .," the true owner may "bring his possessory action to reclaim that which is wrongfully withheld." *Land v. Dollar*, 330 U. S. 731, 738. (Emphasis added.) See *Burdeau v. McDowell*, 256 U. S. 465, 474.

The survival of the *Gouled* distinction is attributable more to chance than considered judgment. Legislation has helped perpetuate it. Thus, Congress has never authorized the issuance of search warrants for the seizure of mere evidence of crime. See *Davis v. United States*, 328 U. S. 582, 606 (dissenting opinion of Mr. Justice Frankfurter). Even in the Espionage Act of 1917, where Congress for the first time granted general authority for the issuance of search warrants, the authority was limited to fruits of crime, instrumentalities, and certain contraband. 40 Stat. 217, 228, 18 U. S. C. § 611 *et seq.* *Gouled* concluded, needlessly it appears, that the Constitution virtually limited searches and seizures to these categories.¹² After *Gouled*, pressure to test this con-

¹² *Gouled* was decided on certified questions. The only question which referred to the Espionage Act of 1917 stated: "Are papers of . . . evidential value . . ., when taken under search warrants issued pursuant to Act of June 15, 1917, from the house or office of the person so suspected,—seized and taken in violation of the 4th amendment?" *Gouled v. United States*, No. 250, Oct. Term, 1920, Certificate, p. 4. Thus the form in which the case was certified made it difficult if not impossible "to limit the decision to the sensible

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clusion was slow to mount. Rule 41 (b) of the Federal Rules of Criminal Procedure incorporated the *Goulded* categories as limitations on federal authorities to issue warrants, and *Mapp v. Ohio*, 367 U. S. 643, only recently made the "mere evidence" rule a problem in the state courts. Pressure against the rule in the federal courts has taken the form rather of broadening the categories of evidence-subject to seizure, thereby creating considerable confusion in the law. See, e. g., Note, 54 Geo. L. J. 593, 607-621 (1966).

The rationale most frequently suggested for the rule preventing the seizure of evidence is that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States v. Poller*, 43 F. 2d 911, 914 (C. A. 2d Cir. 1930). But privacy "would be just as well served by a restriction on search to the even-numbered days of the month. . . . And it would have the extra advantage of avoiding hair-splitting questions" Kaplan, *op. cit. supra*, at 479. The "mere evidence" limitation has

proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material." Chafee, *op. cit. supra*, at 699. The Government assumed the validity of petitioner's argument that *Entick v. Carrington*, *Boyd v. United States*, and other authorities established the constitutional illegality of seizures of private papers for use as evidence. *Goulded v. United States*, *supra*, Brief for the United States, p. 50. It argued, complaining of the absence of a record, that the papers introduced in evidence were instrumentalities of crime. The Court ruled that the record before it revealed no government interest in the papers other than as evidence against the accused. 255 U. S., at 311.

Significantly, *Entick v. Carrington* itself has not been read by the English courts as making unlawful the seizure of all papers for use as evidence. See *Dillon v. O'Brien*, 20 L. R. Ir. 300; *Elias v. Pasmore*, [1934] 2 K. B. 164. Although *Dillon*, decided in 1887, involved instrumentalities, the court did not rely on this fact, but rather on "the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice" 20 L. R. Ir., at 317.

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spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of "a neutral and detached magistrate" *Johnson v. United States*, 333 U. S. 10, 14. The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure "mere evidence" from intrusions to secure fruits, instrumentalities, or contraband.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACK concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 480.—OCTOBER TERM, 1966.

Warden, Maryland Penitentiary,	}	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.
Petitioner,		
v.		
Bennie Joe Hayden.		

[May 29, 1967.]

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE joins, concurring.

While I agree that the Fourth Amendment should not be held to require exclusion from evidence of the clothing as well as the weapons and ammunition found by the officers during the search, I cannot join in the majority's broad—and in my judgment, totally unnecessary—repudiation of the so-called “mere evidence” rule.

Our Constitution envisions that searches will ordinarily follow procurement by police of a valid search warrant. Such warrants are to issue only on probable cause, and must describe with particularity the persons or things to be seized. There are exceptions to this rule. Searches may be made incident to a lawful arrest, and—as today's decision indicates—in the course of “hot pursuit.” But searches under each of these exceptions have, until today, been confined to those essential to fulfill the purpose of the exception: that is, we have refused to permit use of articles the seizure of which could not be strictly tied to and justified by the exigencies which excused the warrantless search. The use in evidence of weapons seized in a “hot pursuit” search or search incident to arrest satisfies this criterion because of the need to protect the arresting officers from weapons to which the suspect might resort. The search for and seizure of fruits are, of course, justifiable on independent grounds: The fruits are an object of the pursuit or arrest of the suspect, and

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should be restored to their true owner. The seizure of contraband has been justified on the grounds that the suspect has not even a bare possessory right to contraband. See, e. g., *Boyd v. United States*, 116 U. S. 616, 623-624 (1886); *United States v. Kirschenblatt*, 16 F. 2d 202, 203 (C. A. 2d Cir. 1926) (L. Hand, J.).

Similarly, we have forbidden the use of articles seized in such a search unless obtained from the person of the suspect or from the immediate vicinity. Since a warrantless search is justified only as incident to an arrest or "hot pursuit," this Court and others have held that its scope does not include permission to search the entire building in which the arrest occurs, or to rummage through locked drawers and closets, or to search at another time or place. *James v. Louisiana*, 382 U. S. 36 (1965); *Stoner v. California*, 376 U. S. 483, 486-487 (1964); *Preston v. United States*, 376 U. S. 364, 367 (1964); *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Go-Bart Co. v. United States*, 282 U. S. 344, 358 (1931); *Agnello v. United States*, 269 U. S. 20, 30-31 (1925); *United States v. Kirschenblatt*, *supra*.¹

In the present case, the articles of clothing admitted into evidence are not within any of the traditional categories which describe what materials may be seized, either with or without a warrant. The restrictiveness of these categories has been subjected to telling criticism,² and

¹ It is true that this Court has not always been as vigilant as it should to enforce these traditional and extremely important restrictions upon the scope of such searches. See *United States v. Rabinowitz*, 339 U. S. 56, 68-86 (1950) (Frankfurter, J., dissenting); *Harris v. United States*, 331 U. S. 145, 155-198 (1947) (dissenting opinions).

² See, e. g., *People v. Thayer*, 63 Cal. 2d 635, 408 P. 2d 108 (1965), cert. denied, 384 U. S. 908 (1966) (Traynor, C. J.); Kaplan, Search and Seizure: A No Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 478 (1961).

although I believe that we should approach expansion of these categories with the diffidence which their imposing provenance commands, I agree that the use of identifying clothing worn in the commission of a crime and seized during "hot pursuit" is within the spirit and intendment of the "hot pursuit" exception to the search-warrant requirement. That is because the clothing is pertinent to identification of the person hotly pursued as being, in fact, the person whose pursuit was justified by connection with the crime. I would frankly place the ruling on that basis. I would not drive an enormous and dangerous hole in the Fourth Amendment to accommodate a specific and, I think, reasonable exception.

As my Brother DOUGLAS notes, *infra*, opposition to general searches is a fundamental of our heritage and of the history of Anglo-Saxon legal principles. Such searches, pursuant to "writs of assistance," were one of the matters over which the American Revolution was fought. The very purpose of the Fourth Amendment was to outlaw such searches, which the Court today sanctions. I fear that in gratuitously striking down the "mere evidence" rule, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court today needlessly destroys, root and branch, a basic part of liberty's heritage.

SUPREME COURT OF THE UNITED STATES

No. 480.—OCTOBER TERM, 1966.

Warden, Maryland Penitentiary, Petitioner, v. Bennie Joe Hayden.	}	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.
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[May 29, 1967.]

MR. JUSTICE DOUGLAS, dissenting.

We start with the Fourth Amendment which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

This constitutional guarantee, now as applicable to the States (*Mapp v. Ohio*, 367 U. S. 643) as to the Federal Government, has been thought, until today, to have two faces of privacy:

(1) One creates a zone of privacy that may not be invaded by the police through raids, by the legislator through laws, or by magistrates through the issuance of warrants.

(2) A second creates a zone of privacy that may be invaded either by the police in hot pursuit or by a search incident to arrest or by a warrant issued by a magistrate on a showing of probable cause.

The first has been recognized from early days in Anglo-American law. Search warrants, for seizure of stolen property, though having an ancient leverage, were criticized even by Coke. *Institutes* Bk. 4, pp. 176-177.

As stated by Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1029, 1067, even warrants authorizing

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seizure of stolen goods were looked upon with disfavor but "crept into the law by imperceptible practice." By the time of Charles II. they had burst their original bounds and were used by the Star Chamber to find evidence among the files and papers of political suspects. Thus in the trial of Algernon Sydney in 1683 for treason "papers, which were said to be found in my [Sydney's] house, were produced as another witness" (9 How. St. Tr. 818, 901) and the defendant was executed. *Id.*; at 906-907. From this use of papers as evidence there grew up the practice of the Star Chamber empowering a person "to search in all places, where books were printed, in order to see if the printer had a license; and if upon such search he found any books which he suspected to be libellous against the church or state, he was to seize them and carry them before the proper magistrate." *Entick v. Carrington, supra*, at 1069. Thus the general warrant became a powerful instrument in proceedings for seditious libel against printers and authors. *Ibid.* John Wilkes led the campaign against the general warrant. *Boyd v. United States*, 116 U. S. 616, 625. Wilkes won (*Entick v. Carrington, supra*, decided in 1765); and Lord Camden's opinion not only outlawed the general warrant (*id.*, at 1072) but went on to condemn searches "for evidence" with or without a general warrant:.

"There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

"In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law

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has provided no paper-search in these cases to help forward the conviction.

"Whether this procedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say.

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." *Id.*, at 1073.

Thus Lord Camden decided two things: (1) that searches for evidence violated the principle against self-incrimination; (2) that general warrants were void.

This decision, in the very forefront, when the Fourth Amendment was adopted, underlines the construction that it covers something other than the form of the warrant¹ and creates a zone of privacy which no government official may enter.

The complaint of Bostonians, while including the general warrants, went to the point of police invasions of personal sanctuaries:

" 'A List of Infringements and Violations of Rights' drawn up by the Boston town meeting late in 1772 alluded to a number of personal rights which had

¹ The Virginia Declaration of Rights, June 12, 1776, in its Article 10 proclaimed only against "general warrants." See Rutland, *The Birth of the Bill of Rights* (1955), p. 232. And the definition of the general warrant included not only a license to search for everything in a named place but to search all and any places in the discretion of the officers. *Frisbie v. Butler*, 1 Kirby 213. See generally Quincy's *Mass. Rep. 1761-1772* Appendix I for the forms of these writs.

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allegedly been violated by agents of the crown. The list included complaints against the writs of assistance which had been employed by royal officers in their searches for contraband. The Bostonians complained that 'our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants.' " Rutland, *The Birth of the Bill of Rights* 25 (1955).

The debates concerning the Bill of Rights did not focus on the precise point with which we here deal. There was much talk about the general warrants and the fear of them. But there was also some reference to the sanctity of one's home and his personal belongings, even including the clothes he wore. Thus in Virginia, Patrick Henry said:

"The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds."

3 Elliott's Debates 448-449.

This indicates that the Fourth Amendment has the dual aspect that I have mentioned. Certainly the debates nowhere suggest that it was concerned only with regulating the form of warrants.

This is born out by what happened in the Congress. In the House the original draft read as follows:

"The right of the people to be secured in their persons, houses, papers, and effects, shall not be

violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized." 1 Annals of Congress, p. 754.

That was amended to read "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches," etc. *Id.*, at 754. Mr. Benson, Chairman of a Committee of Three to arrange the amendments, objected to the words "by warrants issuing" and proposed to alter the amendment so as to read "and no warrant shall issue." *Ibid.* But Benson's amendment was defeated. *Ibid.* And if the story had ended there, it would be clear that the Fourth Amendment touched only the form of the warrants and the manner of their issuance. But when the Benson Committee later reported the Fourth Amendment to the House, it was in the form he had earlier proposed and was then accepted. 1 Annals, at 779. The Senate agreed. Senate Journal August 25, 1789.

Thus it is clear that the Fourth Amendment has two faces of privacy, a conclusion emphasized by Lasson, *The History & Development of the Fourth Amendment* 103 (1937):

"As reported by the Committee of Eleven and corrected by Gerry, the Amendment was a one-barrelled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. That Benson interpreted it in this light is shown by his argument that although the clause was good as far as it went,

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it was not sufficient, and by the change which he advocated to obviate this objection. The provision as he proposed it contained *two* clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment."

Lord Camden's twofold classification of zones of privacy was said by Cooley to be reflected in the Fourth Amendment:

"The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offence actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction." Constitutional Limitations 431-432 (7th ed. 1903).

And that was the holding of the Court in *Boyd v. United States*, 116 U. S. 616, decided in 1886. Mr. Justice Bradley reviewed British history, including *Entick v. Carrington*, *supra*, and American history under the Bill of Rights and said:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtain-

ing information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not." *Id.*, at 623.

What Mr. Justice Bradley said about stolen or forfeited goods or contraband is, of course, not accurate if read to mean that they may be seized at any time even without a warrant or not incident to an arrest that is not lawful. The right to seize contraband is not absolute. If the search leading to discovery of an illicit article is not incidental to a lawful arrest or not authorized by a search warrant, the fact that contraband is discovered does not make the seizure constitutional. *Trupiano v. United States*, 334 U. S. 699, 705; *McDonald v. United States*, 335 U. S. 451; *Henry v. United States*, 361 U. S. 98, 103; *Beck v. Ohio*, 379 U. S. 89; *Aguilar v. Texas*, 378 U. S. 108.

That is not our question. Our question is whether the Government, though armed with a proper search warrant or though making a search incident to an arrest, may seize, and use at the trial, testimonial evidence whether it would otherwise be barred by the Fifth Amendment or would be free from such strictures. The teaching of *Boyd* is that such evidence, though seized pursuant to a lawful search, is inadmissible.

That doctrine had its full flowering in *Gouled v. United States*, 255 U. S. 298, where an opinion was written by Mr. Justice Clarke for a unanimous Court that included both Mr. Justice Holmes and Mr. Justice Brandeis. The prosecution was for defrauding the Government under procurement contracts. Documents were taken from defendant's business office under a search warrant and used at the trial as evidence against him. Stolen or forged papers could be so seized, the Court said; so could lottery tickets; so could contraband; so could property in which

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the public had an interest, for reasons tracing back to warrants allowing the seizure of stolen property. But these papers or documents fell in none of those categories and the Court therefore held that even though they had been taken under a warrant, they were inadmissible at the trial as not even a warrant, though otherwise proper and regular, could be used "for the purpose of making search to secure evidence" of a crime. *Id.*, at 309. The use of those documents against the accused might, of course, violate the Fifth Amendment. *Id.*, at 311. But whatever may be the intrinsic nature of the evidence, the owner is then "the unwilling source of the evidence" (*id.*, at 306), there being no difference so far as the Fifth Amendment is concerned "whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and a seizure of his private papers." *Ibid.*

We have, to be sure, breached that barrier, *Schmerber v. California*, 384 U. S. 757, being a conspicuous example. But I dissented then and renew my opposing view at this time. That which is taken from a person without his consent and used as testimonial evidence violates the Fifth Amendment.

That was the holding in *Gouled*; and that was the line of authority followed by Judge Simon Sobeloff, writing for the Court of Appeals for reversal in this case. 363 F. 2d 647. As he said, even if we assume that the search was lawful, the articles of clothing seized were of evidential value only and under *Gouled* could not be used at the trial against petitioner. As he said, the Fourth Amendment guarantees the right of the people to be secure "in their persons, houses, papers, and effects against unreasonable searches and seizures." Articles of clothing are covered as well as papers. Articles of clothing may be of evidential value as much as documents or papers.

Judge Learned Hand stated a part of the philosophy of the Fourth Amendment in *United States v. Poller*, 43 F. 2d 911, 914:

" . . . it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself,"

The right of privacy protected by the Fourth Amendment relates in part of course to the precincts of the home or the office. But it does not make them sanctuaries where the law can never reach. There are such places in the world. A mosque in Fez, Morocco, that I have visited, is by custom a sanctuary where any refugee may hide, safe from police intrusion. We have no such sanctuaries here. A policeman in "hot pursuit" or an officer with a search warrant can enter any house, any room, any building, any office. The privacy of those places is of course protected against invasion except in limited situations. The full privacy protected by the Fourth Amendment is, however, reached when we come to books, pamphlets, papers, letters, documents, and other personal effects. Unless they are contraband or instruments of the crime, they may not be reached by any warrant nor may they be lawfully seized by the police who are in "hot pursuit." By reason of the Fourth Amendment the police may not rummage around among these personal effects, no matter how formally perfect their authority may appear to be. They may not seize them. If they do, those articles may not be used in

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evidence. Any invasion whatsoever of those personal effects is "unreasonable" within the meaning of the Fourth Amendment. That is the teaching of *Entick v. Carrington*, *Boyd v. United States*, and *Gouled v. United States*.

Some seek to explain *Entick v. Carrington*, on the ground that it dealt with seditious libel and that any search for political tracts or letters under our Bill of Rights would be unlawful *per se* because of the First Amendment and therefore "unreasonable" under the Fourth. That argument misses the main point. A prosecution for seditious libel would of course be unconstitutional under the First Amendment because it bars laws "abridging freedom of speech or of the press." The First Amendment also has a penumbra, for while it protects only "speech" and "press" it also protects related rights such as the right of association. See *NAACP v. Alabama*, 357 U. S. 449, 460, 462; *Bates v. Little Rock*, 361 U. S. 516, 523; *Shelton v. Tucker*, 364 U. S. 479, 486; *Louisiana v. NAACP*, 366 U. S. 293, 296; and *NAACP v. Button*, 371 U. S. 415, 430-431. So it could be held, quite apart from the Fourth Amendment, that any probing into the area of opinions and beliefs would be barred by the First Amendment. That is the essence of what we said in *Watkins v. United States*, 354 U. S. 178, 197:

"Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech, or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

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But the privacy protected by the Fourth Amendment is much wider than the one protected by the First. *Boyd v. United States* was a forfeiture proceeding under the customs revenue law and the paper held to be beyond the reach of the Fourth Amendment was an invoice covering the imported goods. 116 U. S., at 617-619, 638. And as noted, *Gouled v. United States* involved a prosecution for defrauding the Government under procurement contracts and the papers held protected against seizure, even under a technically proper warrant, were (1) an unexecuted form of contract between defendant and another person; (2) a written contract signed by defendant and another person; and (3) a bill for disbursement and professional services rendered by the attorney to the defendant. 255 U. S., at 306-307.

The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a non-descript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing.² This is his preroga-

² This concept of the right of privacy protected by the Fourth Amendment is mirrored in the cases involving collateral aspects of the problem presented in this case:

"It has, similarly, been held that a defendant cannot complain of the seizure of books and papers neither his own, nor in his pos-

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tive not the States'. The Framers, who were as knowledgeable as we, knew what police surveillance meant and how the practice of rummaging through one's personal effects could destroy freedom.

It was in that tradition that we held in *Griswold v. Connecticut*, 381 U. S. 479, that lawmakers could not, as respects husband and wife at least, make the use of contraceptives a crime. We spoke of the pronouncement in *Boyd v. United States* that the Fourth and Fifth Amendments protected the person against all governmental invasions "of the sanctity of a man's home and the privacies of life." 116 U. S., at 630. We spoke of the "right to privacy" of the Fourth Amendment upheld by *Mapp v. Ohio*, 367 U. S. 643, 656, and of the many other controversies "over these prenumbral rights of 'privacy and repose.'" 381 U. S., at 485. And we added:

"Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the

session. It is also the well-settled rule that where the papers are public records the defendant's custody will not avail him against their seizure. Where papers are taken out of the custody of one not their owner, it seems that such person can object if there has been no warrant, or if the warrant was directed to him, but not if the warrant is directed to the owner. If the defendant's property is lawfully out of his possession it makes no difference by what means it comes into the Government's hands as there has been no compulsion exercised upon him. But the privilege extends to letters in the mails. The privilege extends to the office as well as the home.

"On the other hand, to enable a person to claim the privilege, it is not necessary that he be a party to any pending criminal proceeding. He can object to the illegal seizure of his own property and resist a forcible production of it even if he is only called as a witness.

"Nor must a person be a citizen to be entitled to the protection of the Fourth Amendment. . . ." *Fraenkel, Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 375-376.

use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

"We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.*, at 485-486.

This right of privacy, sustained in *Griswold*, is kin to the right of privacy created by the Fourth Amendment. That there is a zone that no police can enter—whether in "hot pursuit" or armed with a meticulously proper warrant—has been emphasized by *Boyd* and by *Gouled*. They have been consistently and continuously approved.³ I would adhere to them and leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right of privacy. Without it the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid.

³ See, e. g., *Carroll v. United States*, 267 U. S. 132, 149-150; *United States v. Lefkowitz*, 285 U. S. 452, 464-466; *Davis v. United States*, 328 U. S. 582, 590, n. 11; *Harris v. United States*, 331 U. S. 145, 154; *United States v. Rabinowitz*, 339 U. S. 56, 64, n. 6; *Abel v. United States*, 362 U. S. 217, 234-235.